No. 99-1815-CFX Title: National Labor Relations Board, Petitioner
v.
Kentucky River Community Care, Inc., et al.

Docketed: May 12, 2000 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	May 12 2000	Petition for writ of certiorari filed. (Response due June 11, 2000)
	Jun 8 2000	Letter from Solicitor General including a Second Circuit decision in Schnurmacher received.
	Jun 9 2000	Waiver of right of respondent Kentucky River Community Care, Inc. to respond filed.
	Jun 13 2000	DISTRIBUTED for Conference of June 28, 2000
	Jun 20 2000	Response requested.
	Jul 20 2000	Brief of respondent Kentucky State District Council of Carpenters in support of petition filed.
	Jul 20 2000	Brief of respondent Kentucky River Community Care, Inc. in opposition filed.
	Aug 2 2000	REDISTRIBUTED for Conference of September 25, 2000
	Aug 2 2000	Reply brief of petitioner National Labor Relations Board filed.
	Sep 26 2000	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT February 21, 2001. **********
	Oct 24 2000	Order extending time to file all briefs on the merits. Petitioner's brief is due on or before November 17, 2000. Respondents' brief on the merits is due on or before December 22, 2000. The reply brief is due on or before January 22, 2001.
	Nov 17 2000	Joint appendix filed.
	Nov 17 2000	Brief of petitioner National Labor Relations Board filed.
	Nov 17 2000	Brief of respondent Kentucky State District Council of Carpenters in support filed.
	Nov 17 2000	Motion of Service Employees International Union, et al. for leave to file a brief as amici curiae filed.
	Nov 17 2000	Motion of American Nurses Association for leave to file a brief as amicus curiae filed.
	Dec 21 2000	Record filed.
	Dec 22 2000	Brief of respondent Kentucky River Community Care, Inc. filed.
	Dec 22 2000	Brief amici curiae of Human Resource Management, et al. filed.
	Dec 22 2000	Brief amicus curiae of American Health Care Association filed.

2 pp

No. 99-1815-CFX

Entry	Date	Proceedings and Orders
	Jan 2 2001	Record filed.
	Jan 19 2001	Reply brief of petitioner National Labor Relations Board filed.
	Jan 19 2001	CIRCULATED.
	Jan 22 2001	Motion of Service Employees International Union, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 22 2001	Motion of American Nurses Association for leave to file a brief as amicus curiae GRANTED.
	Jan 22 2001	Reply brief of respondent KY State District of Carpenters filed.
	Feb 21 2001	ARGUED.

FILED

991815 MAY 12 2000

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LEONARD R. PAGE
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status.

3. Whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees," rather than supervisors, and thus entitled to the rights and protections afforded by the Act.

PARTIES TO THE PROCEEDINGS BELOW

The petitioner here, which was the respondent/cross-petitioner in the court of appeals, is the National Labor Relations Board. The respondents here are Kentucky River Community Care, Inc., which was the petitioner/cross-respondent in the court of appeals, and Kentucky State District Council of Carpenters, AFL-CIO, which was an intervenor in the court of appeals in support of the Board's cross-application for enforcement of the Board's order against respondent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	12
Conclusion	26
Appendix A	1a
Appendix B	26a
Appendix C	34a
Appendix D	35a
Appendix E	61a
Appendix F	64a

TABLE OF AUTHORITIES

Cases:

Adco Elec., Inc., 307 N.L.R.B. 1113 (1992), enforced, 6 F.3d 1110 (5th Cir. 1993)	15
Ahrens Aircraft, Inc., 259 N.L.R.B. 839 (1981), enforced, 703 F.2d 23 (1st Cir. 1983)	22
Allentown Mack Sales & Serv., Inc. v. *NLRB*, 522 U.S. 359 (1998)	18, 19
Beverly Cal. Corp. v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992)	17
Beverly Enters., Mass., Inc. v. *NLRB*, 165 F.3d 960 (D.C. Cir. 1999)	23, 25
Beverly Enters., Minn., Inc. v. *NLRB*, 148 F.3d 1042 (8th Cir. 1998)	20
Beverly Enters.-Pa., Inc. v. *NLRB*, 129 F.3d 1269 (D.C. Cir. 1997)	19
Beverly Enters., Va., Inc. v. *NLRB*, 165 F.3d 290 (4th Cir. 1999)	20, 21
Bowne of Houston, Inc., 280 N.L.R.B. 1222 (1986)	22

Cases—Continued: Page

Caremore, Inc. v. *NLRB*, 129 F.3d 365 (6th Cir. 1997) 17
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 16
Commercial Movers, Inc., 240 N.L.R.B. 288 (1979) 22
FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 23
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 16
Glenmark Assocs., Inc. v. *NLRB*, 147 F.3d 333 (4th Cir. 1998) 20, 21
Golden West Broadcasters-KTLA, 215 N.L.R.B. 760 (1974) 14
Grancare, Inc. v. *NLRB*, 137 F.3d 372 (6th Cir. 1998) 11, 17, 22
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996) 23
Hydro Conduit Corp., 254 N.L.R.B. 433 (1981) 22
Integrated Health Servs. v. *NLRB*, 191 F.3d 703 (6th Cir. 1999) 17, 18, 19
Leedom v. *Kyne*, 358 U.S. 184 (1958) 16
Marine Eng'rs Beneficial Ass'n v. *Interlake S.S. Co.*, 370 U.S. 173 (1962) 17
Mid-America Care Found. v. *NLRB*, 148 F.3d 638 (6th Cir. 1998) 11, 17-18
NLRB v. *Attleboro Assocs., Ltd.*, 176 F.3d 154 (3d Cir. 1999) 19, 21
NLRB v. *Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir. 1991) 23
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 14
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 16
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 17
NLRB v. *Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999) 19, 21

Cases—Continued: Page

NLRB v. *Health Care & Retirement Corp.*, 511 U.S. 571 (1994) 3, 12, 18
NLRB v. *Hilliard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999) 19, 21
NLRB v. *Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983) 16, 24
NLRB v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959) 14
NLRB v. *Swift & Co.*, 292 F.2d 561 (1st Cir. 1961) 17
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) 23
NLRB v. *Yeshiva Univ.*, 444 U.S. 672 (1980) 16
New York Univ. Med. Ctr. v. *NLRB*, 156 F.3d 405 (2d Cir. 1998) 23
Nymed, Inc., d/b/a Ten Broeck Commons, 320 N.L.R.B. 806 (1996) 3, 4, 13, 14, 15
OCAW v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1971), cert. denied, 404 U.S. 1039 (1972) 25
Providence Alaska Med. Ctr. v. *NLRB*, 121 F.3d 548 (9th Cir. 1997) 20, 24
Providence Hosp., 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997) 3, 4, 13
Rest Haven Living Ctr., 322 N.L.R.B. 210 (1996) 4, 15
Schnuck Markets, Inc. v. *NLRB*, 961 F.2d 700 (8th Cir. 1992) 23
Skidmore, Owings & Merrill, 192 N.L.R.B. 920 (1971) 16
St. Alphonsus Hosp., 261 N.L.R.B. 620 (1982), enforced, 703 F.2d 577 (9th Cir. 1983) 4, 22
Thayer Dairy Co., 233 N.L.R.B. 1383 (1977) 22

Statute:	Page
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 2(3), 29 U.S.C. 152(3)	2
§ 2(11), 29 U.S.C. 152(11)	*passim*
§ 2(12), 29 U.S.C. 152(12)	15-16
§ 7, 29 U.S.C. 157	10
§ 8(a)(1), 29 U.S.C. 158(a)(1)	10
§ 8(a)(5), 29 U.S.C. 158(a)(5)	10
Miscellaneous:	
S. Rep. No. 105, 80th Cong., 1st Sess. (1947)	14

In the Supreme Court of the United States

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-25a, is reported at 193 F.3d 444. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding, App., *infra*, 26a-33a, are noted at 323 N.L.R.B. No. 209 (Table). The decisions of the Board in the underlying representation proceeding, App., *infra*, 34a-60a, are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 61a-63a) was entered on January 27, 2000. A petition for rehearing was denied on March 23, 2000 (App., *infra*, 64a-65a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT

1. To be deemed a supervisor under Section 2(11) of the National Labor Relations Act (NLRA or Act), an employee must have authority to engage in one of 12 specified supervisory functions and must exercise that authority "in the interest of the employer," using "independent judgment," and not judgment "of a merely routine or clerical nature." 29 U.S.C. 152(11). In

NLRB v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), this Court considered the validity of the Board's approach at that time to determining whether a nurse is a "supervisor" within the meaning of Section 2(11). Under that approach, "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients," was not authority exercised "in the interest of the employer." *HCR*, 511 U.S. at 574, 576. The Court held that the Board's interpretation of "in the interest of the employer" was inconsistent with the ordinary meaning of that phrase and with prior decisions of the Court, and improperly created a special test of supervisory status for the health-care industry. *Id.* at 574, 576-584. The Court explained, however, that other "phrases in §2(11) such as '*independent judgment*' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees." *Id.* at 579 (emphasis added). The Court did not pass on the proper interpretation of any statutory element other than "in the interest of the employer." *Id.* at 583.

The principal issue presented by this case is whether the Board's current approach to determining whether a nurse is a "supervisor" under Section 2(11) of the Act—which the Board developed after *HCR* and which turns on the statutory term "independent judgment," rather than the phrase "in the interest of the employer"—is reasonable and entitled to deference from the courts. The Board developed its current approach in two cases in which it heard oral argument and considered the submissions of numerous amici. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997); *Nymed, Inc., d/b/a Ten Broeck Commons*, 320 N.L.R.B. 806 (1996). As we discuss pp. 12-16, *infra*,

after carefully examining the structure of the Act, the legislative history of Section 2(11), and the relevant case law, including *HCR*, the Board decided to apply to nurses its "traditional analysis for determining the supervisory status of employees in other occupations." See *Providence Hosp.*, 320 N.L.R.B. at 717. That analysis entails an inquiry into whether the employee at issue exercises "independent judgment" in connection with one (or more) of the functions listed in Section 2(11). In the Board's view, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards is not the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11). See *Providence Hosp.*, 320 N.L.R.B. at 725-730; *Ten Broeck Commons*, 320 N.L.R.B. at 809-812. See also *Rest Haven Living Ctr.*, 322 N.L.R.B. 210, 211 (1996).

This case also presents the question whether the Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and entitled to judicial deference. As we discuss *infra*, pp. 12, 21-23, the Board has long placed the burden of proof on the party asserting that the employees at issue are supervisors. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced, 703 F.2d 577 (9th Cir. 1983) (Table).

2. a. Respondent is a nonprofit organization that operates mental health facilities in Kentucky. This case involves the Caney Creek Rehabilitation Center, a transitional residential center for mentally ill individuals who are seeking to develop skills necessary for independent living. Respondent operates Caney Creek under contracts with the Commonwealth of Kentucky Department for Mental Health and Mental Retardation.

The contracts, which incorporate by reference certain provisions of Kentucky law, set forth eligibility restrictions for residents, facility staffing requirements, and other guidelines that govern the services that respondent provides. App., *infra*, 2a, 5a, 37a-39a.

Caney Creek is organized into two wings, each of which is divided into two units that each accommodate 20 residents. The facility operates 24 hours a day, seven days a week. App., *infra*, 45a. Overall responsibility for the operation of Caney Creek is vested in an administrator and assistant administrator. Caney Creek also employs two unit coordinators, as well as a nursing coordinator, a recreational counselor, a manager for housekeeping and maintenance, and a kitchen supervisor. *Ibid.* Those individuals are stipulated to be Section 2(11) supervisors. *Id.* at 54a. The supervisory status of Caney Creek's registered nurses (RNs) and rehabilitation counselors is, however, in dispute.

Caney Creek employs 20 rehabilitation counselors, 40 rehabilitation assistants, six RNs, and three licensed practical nurses (LPNs). App., *infra*, 45a; Tr. 158. Each of the four treatment units is staffed with five rehabilitation counselors and ten rehabilitation assistants. App., *infra*, 6a, 45a. The RNs and LPNs provide medical services to residents throughout the units. *Id.* at 45a, 50a. Two RNs and one LPN work on each of three shifts (7 a.m. to 3:30 p.m., 3 p.m. to 11:30 p.m., and 11 p.m. to 7:30 a.m.). *Id.* at 50a; Tr. 224, 260. Rehabilitation assistants work on each shift, and rehabilitation counselors primarily work on only the first shift. App., *infra*, 47a; Tr. 138.

For each resident, Caney Creek establishes a treatment plan that contains rehabilitative goals and specifies activities designed to accomplish those goals. App., *infra*, 46a. The treatment plan also has a medical

component, because all residents receive some form of medication. The rehabilitation counselors and RNs participate in the formulation of the plans, but each resident's treatment plan must be approved by the unit coordinator and the resident's psychiatrist. *Id.* at 19a-20a, 46a, 47a; Tr. 111, 183. Both the rehabilitation counselors and the RNs direct less-skilled employees to deliver services in accordance with the employer-specified standards expressed in the treatment plans.

The non-medical component of the treatment plans is implemented on a daily basis by the rehabilitation assistants. Each morning, the rehabilitation counselors meet with the rehabilitation assistants, who volunteer for particular tasks. App., *infra*, 20a, 47a-48a. The rehabilitation assistants ensure that the residents wake up on time, are properly bathed and dressed, attend scheduled classes, and keep their doctors' appointments. *Id.* at 47a-48a; Tr. 124.

The medical component of the treatment plans is implemented on a daily basis by the RNs and LPNs. App., *infra*, 17a, 45a, 46a; Tr. 158, 183. The LPNs pass medications to the residents. The RNs ensure that the correct medication is passed to the correct resident at the correct time, handle any necessary documentation, and provide direct medical care to the residents. App., *infra*, 17a, 50a; Tr. 141, 158. The RNs also work with the rehabilitation assistants: the assistants bring the residents' health problems to the RNs' attention and assist the RNs in administering medication "if * * * a resident [is] really acting out." Tr. 331-332.

During part of the second and all of the third shift, neither the administrator nor any other stipulated supervisor is physically present at Caney Creek. However, a stipulated supervisor is always "on call" at those times. When the stipulated supervisor is "on call"

rather than on site, the RNs on duty are designated by respondent as "building supervisors." App., *infra*, 16a, 50a; Tr. 200. As "building supervisors," the RNs have some additional duties. The building supervisors are "in charge of the facility and all rehabilitation staff." R. Exh. 13. When the building supervisors "come on duty," they are "[to] visit the units to check the coverage," and "[i]f necessary, pull from one unit to another." R. Exh. 14. However, the minimum number of employees necessary to cover a given shift is set by management. Tr. 149-150. The building supervisors transfer employees from one unit to another for the particular shift simply "to make sure the head count is there." *Id.* at 155.

The building supervisors also handle staff shortages when employees telephone that they are unable to report for their scheduled shift. App., *infra*, 16a, 51a; R. Exh. 13. In those situations, the building supervisors first seek a volunteer from the preceding shift to stay over. If no one volunteers, the building supervisors, using a list, attempt to reach by telephone an off-duty employee who lives nearby to come in to work. In no case, however, do building supervisors have authority to compel an employee to work under threat of discipline. App., *infra*, 16a, 51a.[1]

b. In January 1997, the Kentucky State District Council of Carpenters (Union) filed a petition with the Board seeking to represent an appropriate bargaining

---

[1] Respondent has contended that the building supervisors are authorized to "write up" an employee who does not "comply" with a decision "to shift staff between units" and to "send an employee home" in some circumstances. App., *infra*, 16a-17a. There is no evidence in the record, however, that the building supervisors have ever exercised that purported authority in either respect. See pp. 8-9, *infra*.

unit of employees employed by respondent at Caney Creek. Respondent contended that the RNs and the rehabilitation counselors should be excluded from any bargaining unit as Section 2(11) supervisors.[2] After a hearing, the Board's Regional Director (RD) rejected that contention. App., *infra*, 50a-53a. The RD explained that, after this Court's decision in *HCR*, "the Board determined to apply the same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Id.* at 52a. The RD also noted that *HCR* did not "alter[]" the Board's "well settled" rule that "the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status." *Ibid.*

Applying those principles, the RD concluded that respondent had "not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act." App., *infra*, 53a. The RD found that "the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." *Id.* at 51a. He found that "the RNs, including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." *Id.* at 52a. Although respondent contended that "RNs can 'write-up' employees," the RD found that "there is no evidence in the record that they have ever done so." *Id.* at 51a. In

[2] Respondent also contended that it is exempt from the Board's jurisdiction as a "political subdivision" of the Commonwealth of Kentucky. Both the Board and the court of appeals rejected that contention. App., *infra*, 8a-13a, 37a-44a.

fact, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. *Ibid.* The RD further found that "[t]he 'building supervisors' do not have any authority * * * to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Ibid.* He concluded that "[t]he fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status." *Id.* at 53a.

The RD also found that the rehabilitation counselors do not possess any indicia of supervisory authority over the rehabilitation assistants. App., *infra*, 49a. "They do not have the authority to hire, fire, discipline, promote or evaluate employees and any assignment or direction which they may give other employees is routine in nature." *Ibid.* Nor does "[t]he fact that the counselors formulate treatment plans which are administered in part by rehabilitation assistants * * * make the rehabilitation counselors supervisors within the meaning of Section 2(11) of the Act." *Ibid.*

c. Respondent filed a request for review of the RD's decision with the Board. Insofar as relevant here, the Board denied the request for review. App., *infra*, 34a. On March 20, 1997, the Board conducted an election among the employees at Caney Creek, which the Union won. Accordingly, the Board certified the Union as the bargaining representative of the employees, including the RNs and the rehabilitation counselors. *Id.* at 28a-29a.

Respondent refused to bargain with the Union. App., *infra*, 29a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that respondent's refusal to bargain with the Union

violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). App., *infra*, 26a.[3] On summary judgment, the Board found that respondent had violated the Act and ordered it to bargain with the Union. *Id.* at 26a-33a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the Board's finding that the rehabilitation counselors are not supervisors under Section 2(11) of the Act but held, by a divided vote, that "the registered nurses [that respondent] employs are supervisors." App., *infra*, 2a. The court therefore denied enforcement of the Board's order "insofar as it includes the registered nurses in the bargaining unit." *Ibid.*

The court explained that its task in this case was to determine whether the RNs' responsibilities "call for the exercise of 'independent judgment' under section [2(11)]." App., *infra*, 17a. The court stated:

> Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to

[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the Act, 29 U.S.C. 157, among which is the right of employees "to bargain collectively through representatives of their own choosing."

> direct patient care by virtue of their training and expertise, not because of their connection with "management."

Ibid.

The court of appeals observed that it "has repeatedly rejected this interpretation" of "independent judgment" and has instead "found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts." App., *infra*, 17a (citing *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638 (6th Cir. 1998)). The court also faulted the Board for "ignor[ing] our repeated admonition that '[t]he [NLRB] has the burden of proving that employees are not supervisors.'" *Id.* at 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)).

Applying its own understanding of "independent judgment" and the burden of proof, the court of appeals reasoned that the Caney Creek registered nurses are supervisors because they "direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments." App., *infra*, 18a-19a. The court concluded that those duties "involve independent judgment." *Id.* at 19a.

The court upheld, however, the Board's finding that the rehabilitation counselors are not supervisors. The court explained that the rehabilitation counselor's primary function of designing a patient treatment plan "does not, of itself, involve any supervisory authority."

App., *infra*, 21a. Moreover, the fact that the assistants "carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors." *Ibid.*

Judge Jones dissented in part. Although he agreed with the panel majority's holding as to the rehabilitation counselors, he would have sustained the Board's conclusion that the RNs are not statutory supervisors. App., *infra*, 22a-25a.

REASONS FOR GRANTING THE PETITION

After this Court's decision in *NLRB* v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), the Board undertook to address anew how to apply, in the health care context, the Act's express exclusion of "supervisors" from its protections. The Board concluded that no special rule was required and that it should apply to nurses and other health care workers its traditional analysis for determining the supervisory status of employees in other occupations. See pp. 3-4, *supra*. Consistent with that traditional analysis, the Board concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the Act. Further, the Board has long held that the party alleging that an individual is a supervisor bears the burden of proving that claim. In this and similar cases, the Sixth Circuit has "repeatedly" rejected the Board's position on both of those issues. App., *infra*, 17a; see also *id.* at 15a.

The decision of the court of appeals squarely conflicts with decisions of other courts of appeals on both issues.

Those issues cut across all industries subject to the Board's jurisdiction and are of recurring importance to the proper administration of the Act. This Court's review is warranted in order to resolve the double conflict in the circuits presented by this case and to reaffirm that judicial deference is owed the Board's interpretation of the NLRA when, as in this case, that interpretation is rational and consistent with the Act.

1. a. Under Section 2(11) of the NLRA, an employee is not a supervisor merely because he has authority to assign, responsibly to direct, or to exercise one of the other listed supervisory functions with respect to other employees. An employee is a supervisor only if he exercises that authority using "independent judgment," and not if his exercise of that authority is "of a merely routine or clerical nature." 29 U.S.C. 152(11). As we have explained, in the Board's view, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" within the meaning of the Act. *Providence Hosp.*, 320 N.L.R.B. at 725-730; *Ten Broeck Commons*, 320 N.L.R.B. at 809-812.

The Board's view comports with the statutory text. The text makes clear that an employee may exercise some supervisory authority without being a supervisor. Indeed, it makes clear that an employee may exercise supervisory authority that requires the use of "judgment" without being a supervisor. To be classed a supervisor, an employee must exercise supervisory authority using "independent" judgment and not judgment that is "routine" or "clerical." The Board interprets those qualifiers to exclude ordinary professional or technical judgment of the type we have described.

That interpretation is not only consistent with the statutory text but rational because it properly effectuates Congress's purpose in excluding supervisors from the coverage of the Act. As this Court has explained, in framing the definition of "supervisor" in Section 2(11), Congress intended to exclude from the coverage of the Act only those employees who are vested with "genuine management prerogatives," but to retain coverage for "minor supervisory employees," such as "straw bosses, leadmen, [and] set-up men." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). "[M]inor supervisory employees," such as leadmen, often exercise routine technical judgment in directing the work of less-skilled employees. Nonetheless, the Board has traditionally held such skilled individuals to be employees, not supervisors.[4]

The Board's post-*HCR* interpretation of "independent judgment" brings its Section 2(11) standard for nurses into harmony with its longstanding view respecting leadmen and other minor supervisory employees. Under that view, the exercise of circumscribed

[4] See, *e.g.*, *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) (distinguishing "a superior workman or lead man who exercises the control of a skilled worker over less capable employees" from "a supervisor who shares the power of management"), cert. denied, 359 U.S. 911 (1959); *Golden West Broadcasters-KTLA*, 215 N.L.R.B. 760, 762 n.4 (1974) ("[A]n employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor. * * * This is so even when the more senior or more expert employee exercises some independent discretion where * * * such discretion is based upon special competence or upon specific articulated employer policies."). See also *Ten Broeck Commons*, 320 N.L.R.B. at 809-810.

discretion based on professional or technical skills and experience is not independent judgment that triggers supervisory status. See note 4, *supra*. A nurse's articulating the meaning of an established health care routine to an aide—like an electrician's giving directions on the basis of a reading of a wiring diagram or blueprint[5]—may well involve the exercise of some degree of judgment. Without more, however, a nurse delegated such limited authority over other employees is not exercising independent judgment, but only making a routine professional or technical judgment and giving directions based on that judgment.[6]

That interpretation is also consistent with the principle that the Board has long applied to determine whether individuals with professional training in other industries exercise the requisite degree of judgment to vest them with supervisory authority. The Act expressly covers "professional employees," who, by definition, engage in "the consistent exercise of discretion

[5] See *Adco Elec., Inc.*, 307 N.L.R.B. 1113, 1122-1126 (1992) (journeyman electrician's directing work of apprentice on the basis of superior knowledge insufficient to establish supervisory status where job blueprints and progress reports provided by management dictated what work should be done and when), enforced, 6 F.3d 1110, 1117-1118 (5th Cir. 1993).

[6] See *Rest Haven Living Ctr.*, 322 N.L.R.B. at 211 (where "the LPNs' directives to [nurse's aides] are narrowly circumscribed and involve giving general, routine directions to lesser skilled employees consistent with established employer policies in order to maintain the quality of care * * * this type of direction does not involve the independent judgment required by Section 2(11)"); *Ten Broeck Commons*, 320 N.L.R.B. at 807, 809-812 & nn. 9-11 (LPNs' "narrowly circumscribed" assignment and direction of aides is routine when based on detailed individual health care plans that reflect the LPNs' expert technical judgment and are reviewed and approved by a registered nurse).

and judgment." 29 U.S.C. 152(12). See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Professional employees, such as the registered nurses involved in this case, often direct less-skilled employees with whom they work. See *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983). However, as this Court has recognized, the Board has traditionally held that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672, 690 (1980). Rather, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Ibid.*[7]

b. The court of appeals erred in substituting its own interpretation of the phrase "independent judgment" for the Board's interpretation. This Court has repeatedly held that the Board's interpretations are "entitled to deference from the courts" if "rational and consistent" with the Act. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). See also *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Because the Board's interpretation

[7] The Court in *Yeshiva* described the Board's decision in *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920 (1971), as "accurately captur[ing] the intent of Congress." 444 U.S. at 690. In that case, the Board found that professional architects in charge of projects who had "some discretion in assigning work and [were] professionally responsible for the quality of work performed," were not supervisors "but merely provide[d] professional direction and coordination for other professional employees." 192 N.L.R.B. at 921.

of "independent judgment" is a reasonable construction of an ambiguous statutory term and is entirely consistent with the Act, the court of appeals should have deferred to that interpretation.[8]

The court refused to defer to the Board's interpretation because "the NLRB has continuously interpreted [that term] in a manner that is inconsistent with th[e] circuit's precedent." App., *infra*, 17a. Thus, the Sixth Circuit has held that "the Board erred as a matter of law when it endorsed the view that the evidence regarding the nurses' scheduling, assignment, and break approval duties was insufficient" to indicate supervisory status because those duties "simply flowed from the nurses' professional knowledge and training." *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 711 (6th Cir. 1999). Quoting from *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992), a decision that predated this Court's decision in *HCR*, the court of appeals stated: "It is perfectly obvious that the kind of judgment exercised by registered nurses in directing . . . nurses' aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not 'merely routine.'" *Ibid.* Accord *Caremore, Inc.* v. *NLRB*, 129 F.3d 365, 370 (6th Cir. 1997); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 376 (6th Cir. 1998); *Mid-*

[8] As this Court has noted, courts have accorded the Board "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Eng'rs Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 179 n.6 (1962) (quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). See also *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (courts must "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life").

America Care Found. v. *NLRB*, 148 F.3d 638, 641 (6th Cir. 1998).

The Sixth Circuit's refusal to defer to the Board's interpretation of "independent judgment" is based on the court's belief that the Board's interpretation replicates the same "false dichotomy" that this Court rejected in *HCR* between "acts taken in connection with patient care and acts taken in the interest of the employer." *Integrated Health*, 191 F.3d at 711 (quoting *HCR*, 511 U.S. at 577). As discussed pp. 2-3, *supra*, *HCR* rejected only the Board's "in the interest of the employer" test for determining the supervisory status of nurses. 511 U.S. at 574, 576. The Court made quite clear the limited reach of its holding: "our decision casts no doubt on Board or court decisions interpreting parts of §2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Indeed, the Court acknowledged that the statutory phrase "independent judgment" is "ambiguous" and, therefore, that the Board is entitled to "ample room" in applying it to "different categories of employees." *Id.* at 579. The Court also recognized (without any indication of disapproval) that, in other industries, the Board has applied "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives" in deciding whether employees exercise "independent" judgment. *Id.* at 583. Thus, the Sixth Circuit erred in concluding that the Board's construction of "independent judgment" is foreclosed by *HCR*.[9]

[9] The court of appeals also erroneously concluded that the Board's interpretation is not entitled to judicial deference under this Court's decision in *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359 (1998). App., *infra*, 18a. In *Allentown Mack*, this Court, unlike the court of appeals here, afforded deference to the Board rule at issue. 522 U.S. at 363-366. The Court was critical of the Board for "in practice its divorcing of the rule announced from the rule applied." *Id.* at 376. In this case, however, the Board has not applied a rule different from the one that it has formally enunciated.

c. The Sixth Circuit's rejection of the Board's interpretation of "independent judgment," although consistent with decisions of the Third and Fourth Circuits, directly conflicts with decisions of the D.C., First, Seventh, Eighth and Ninth Circuits, which have accepted the Board's interpretation. See *NLRB* v. *Attleboro Assocs., Ltd.*, 176 F.3d 154, 163 (3d Cir. 1999) (noting conflict); *Integrated Health Servs.*, 191 F.3d at 713 (Jones, J., concurring) (same).

Thus, in *Beverly Enterprises-Pennsylvania, Inc.* v. *NLRB*, 129 F.3d 1269 (1997) (per curiam), the D.C. Circuit agreed with the Board that "the question of independent judgment under section 2(11) is one of the degree of discretion exercised," and the court of appeals upheld the Board's conclusion that nurses who "assign[ed] and monitor[ed] the performance of discrete patient care tasks * * * and sometimes assign[ed] [aides] to particular patient rooms within a wing" were not supervisors. *Id.* at 1270. Similarly, in *NLRB* v. *Hilliard Development Corp.*, 187 F.3d 133, 142-143 (1999), the First Circuit deferred to the Board's interpretation, explaining that it "harmonizes the Act's definitions of 'supervisor' and 'professional employee' in a sensible way, consistent with Congress' intent to exclude as supervisors only those employees with 'genuine management prerogatives.'"

In *NLRB* v. *Grancare, Inc.*, 170 F.3d 662 (1999) (en banc), the Seventh Circuit held that, when nurses exercise their power "in fairly routine, preordained

ways," it is reasonable for the Board to conclude that "the 'judgment' of [nurses] in exercising their incidental supervisory authority over [aides] is not the 'independent judgment' concerned with management prerogatives contemplated by §2(11) [but] [r]ather, it is more properly viewed as 'professional judgment' exercised in getting their assigned work done with [aides] employed for that purpose." *Id.* at 668. And, in *Beverly Enterprises, Minnesota, Inc.* v. *NLRB*, 148 F.3d 1042 (1998), the Eighth Circuit agreed with the Board that, given the employer's system of protocols, its nurses did not exercise "independent judgment" in reassigning aides and reprioritizing their work when necessitated by "changes in patient condition, changes in personnel, and other circumstances." *Id.* at 1047. Finally, in *Providence Alaska Medical Center* v. *NLRB*, 121 F.3d 548, 554 (1997), the Ninth Circuit upheld the Board's conclusion that, "[b]y exercising her professional judgment in [a] routine manner while working alongside and guiding less experienced employees, the charge nurse is not transformed into a supervisor."

However, like the court of appeals below, the Third and Fourth Circuits have rejected the Board's interpretation. In *Beverly Enterprises, Virginia, Inc.* v. *NLRB*, 165 F.3d 290 (1999) (en banc), the Fourth Circuit held that "independent judgment" is authority "exercised in a non-ministerial way to achieve management goals." *Id.* at 295. In that court's view, the exercise of authority is "ministerial" (and thus non-supervisory) only if it is so highly regimented by the employer's standards that the standards leave no room for thought. See *Glenmark Assocs., Inc.* v. *NLRB*, 147 F.3d 333, 341 (4th Cir. 1998). See also *Beverly Enterprises, Va.*, 165 F.3d at 303 (Phillips J. dissenting). Similarly, in *Attleboro Associates*, the Third Circuit concluded that nurses

exercise "supervisory judgment" in directing aides when the nurses "hold a superior rank to them and are entrusted by [the employer] to ensure the quality of care that residents receive." 176 F.3d at 169; see also *id.* at 167 (holding that "decisions to assign workers are 'inseverable from the exercise of independent judgment'") (quoting *Glenmark Assocs.*, 147 F.3d at 342).

The different holdings of the courts of appeals turn, in significant part, on whether or not the courts believe that the Board's interpretation is foreclosed by *HCR*. Like the court of appeals here, the Third and Fourth Circuits have characterized the Board's interpretation as an "end run" around *HCR*, but the Seventh and First Circuits have rejected that characterization.[10] The disagreement among the courts of appeals on the proper interpretation of "independent judgment" prevents uniform administration of the Act on a significant issue of coverage. With en banc decisions on both sides of the conflict, there is no likelihood that the courts of appeals will reach consensus on this important issue absent this Court's intervention.

2. The holding of the court of appeals that the Board has the burden of proving that an employee is not a supervisor also warrants this Court's review. That

---

[10] Compare *Beverly Enterprises, Va.*, 165 F.3d at 296 (Board's interpretation is "an end run around an unfavorable Supreme Court decision" and reflects a "policy bias"), and *Attleboro Associates*, 176 F.3d at 168 (Board's interpretation "may be a false dichotomy intended to avoid the Supreme Court's rejection of the 'patient care' dichotomy in [*HCR*]"), with *Grancare*, 170 F.3d at 666 (declining "to conjecture about whether the Board has tried to do an end run around [*HCR*]"), and *Hilliard Development Corp.*, 187 F.3d at 137 (finding "no reason not to apply our usual standard of deference to the Board's interpretations of ambiguous portions of the Act").

holding conflicts with the decisions of other courts of appeals, which have, both within and outside of the health care field, accepted the Board's rule that the burden of proving supervisory status falls "on the party alleging that such status exists." *St. Alphonsus Hosp.*, 261 N.L.R.B. at 624.

The Board's rule applies regardless whether the employer, the union, or the Board's General Counsel is the party asserting supervisory status. Thus, an employer must carry the burden when it defends against an unfair labor practice complaint by claiming that the employee against whom it allegedly discriminated is a supervisor. See, *e.g.*, *Ahrens Aircraft, Inc.*, 259 N.L.R.B. 839, 842 (1981), enforced, 703 F.2d 23 (1st Cir. 1983). Likewise, a union must carry the burden when it challenges a ballot by claiming that the voter who cast the ballot is a supervisor. See, *e.g.*, *Bowne of Houston, Inc.*, 280 N.L.R.B. 1222, 1223 (1986). And the General Counsel must carry the burden when he alleges an individual's supervisory status as part of his case. See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 441 (1981). Furthermore, the Board applies the same rule to all industries subject to its jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977).

As we have explained at p. 14, *supra*, Congress intended that the Act's exclusion of supervisors from coverage would be limited. The Board's rule effectuates that intention by placing the burden of proving supervisory status upon those invoking the exemption. "In contrast, placing the burden of proof on the Board presumes that all employees simply asserted by employers to be supervisors are exempt from the Act's coverage until proven otherwise." *Grancare*, 137 F.3d at 378 (Moore, J., concurring).

The Board's rule also accords with general principles governing the interpretation of statutory exemptions, including exemptions from the NLRA. See *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 399 (1996) ("[A]dministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (noting "rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits").

The decision of the court of appeals rejecting the Board's method of allocating the burden of proof conflicts with decisions of other courts of appeals, which have accepted the Board's method, both within and outside of the health care field. See *Beverly Enterprises, Mass., Inc.* v. *NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999); *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 412-413 (2d Cir. 1998); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). See also *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) (upholding as reasonable Board's allocation of burden of proof in another context).

3. If the court of appeals had accepted the Board's interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the court would have sustained the Board's finding that the RNs working at Caney Creek are not supervisors. The RNs "are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case." App., *infra*, 17a. In that capacity, RNs sometimes give directions to other employees: for

example, the RN may direct an LPN to pass a particular medication to a particular resident at a particular time or direct a rehabilitation assistant to assist her in treating a resident who is "really acting out"; or (when acting as building supervisor) she may direct a rehabilitation assistant to work his shift on a unit that would otherwise be understaffed. See pp. 6-7, *supra*. However, in issuing such directions, the discretion exercised by the RN is based on her special professional competence and is circumscribed by the requirements of the resident's treatment plan and respondent's staffing policies. The Board thus reasonably concluded that the nurses do not exercise "independent judgment" in discharging those functions. See pp. 8-9, *supra*.

As the court of appeals found, when they serve as building supervisors, the RNs have authority to "call employees into work" or "ask employees to remain on duty" but have no "authority to force an employee to work." App., *infra*, 16a. The RD found that, in carrying out those functions, the RN follows a procedure established by respondent that circumscribes any discretion exercised by the nurse. See p. 9, *supra*; App., *infra*, 53a. The Board therefore reasonably concluded that the judgment exercised by a nurse is more "routine" than "independent," particularly as she cannot compel an employee to work. See, *e.g.*, *Providence Alaska Med. Ctr.*, 121 F.3d at 552-553.

The court of appeals also found it significant that the building supervisor "is the highest ranking employee in the building" for "almost two thirds of the day." App., *infra*, 16a, 18a. However, that circumstance, standing alone, does not compel a finding that the nurses are statutory supervisors. See *Res-Care*, 705 F.2d at 1467.

Finally, because the court of appeals incorrectly placed the burden of proof on the Board, the court gave

undue weight to a memorandum stating that RNs have authority as building supervisors to "write up" employees who do not "comply" with requests that they work their shifts on units that would otherwise be understaffed. App., *infra*, 16a. Similarly, the court placed undue reliance on a company official's assertion that the RNs, when acting as building supervisors, have authority "[to] send an employee home, but the nurse would then need to inform that employee's immediate supervisor." *Id.* at 17a.

The RD discounted the significance of the RNs' putative authority to write up employees because there was "no evidence in the record that they have ever" done so, and, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. App., *infra*, 51a. Moreover, the record evidence also established that the nurses had never exercised their purported authority to send employees home. See Tr. 151-152, 153, 279.

If the court of appeals had placed the burden on respondent to prove that the nurses are supervisors by virtue of their alleged authority to "write-up" employees and to send employees home, the court would have upheld the Board's conclusion, on this record, that respondent had failed to sustain its burden. See, *e.g.*, *OCAW* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971) (Board reasonably concluded that "naked designations of 'paper power'" by employer are negated by "the nearly total lack of evidence of authority actually exercised"), cert. denied, 404 U.S. 1039 (1972); *Beverly Enterprises, Mass.*, 165 F.3d at 963 ("[A]bsent exercise, there must be other affirmative indications of authority. Statements by management purporting to confer authority do not alone suffice.").

Accordingly, under long-established principles applied by the Board and the courts in the administration of the Act in a wide variety of employment contexts, the Board's determination that the nurses in this case are covered by the Act should have been upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

LEONARD R. PAGE
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 97-5885, 97-5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL
OF CARPENTERS, AFL-CIO, INTERVENOR

Argued Nov. 5, 1998
Decided Oct. 4, 1999

OPINION

RYAN, Circuit Judge.

This is another in an increasing number of cases involving the question whether nurses are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(11), in which we are required to direct the National Labor Relations Board to apply the

law as this court has announced it, and not as the Board would prefer it to be.

The petitioner, Kentucky River Community Care, Inc. (KRCC), seeks to avoid union certification, claiming that (1) it is a political subdivision and therefore not an "employer" subject to the National Labor Relations Act, and (2) even if it is an employer for purposes of the NLRA, its registered nurses and rehabilitation counselors are "supervisors" and, therefore, exempt from the collective bargaining unit.

The National Labor Relations Board cross petitions, seeking enforcement of its order requiring KRCC to bargain with the union. We hold that KRCC is not a political subdivision, and that while the registered nurses KRCC employs are supervisors, the rehabilitation counselors are not. We therefore enforce the NLRB's order except insofar as it includes the registered nurses in the bargaining unit.

I.

KRCC is a nonprofit organization operating numerous mental health facilities throughout an eight-county region of Kentucky. One such facility is the Caney Creek Rehabilitation Center, which is the subject of this appeal. These facilities are transitional residential centers whose mission is to help patients become self sufficient.

Because we first address the issue whether KRCC is a political subdivision, our review of the facts entails an inquiry into the KRCC corporate structure.

A.

The then-Chairman of the East Kentucky Health Planning Council, C. Vernon Cooper, Jr., filed the articles of incorporation for KRCC on May 21, 1979. Cooper signed the articles as "a citizen of the Commonwealth of Kentucky," and there is no indication from the articles or the manner in which Cooper signed his name that he was acting in any official capacity. The articles enumerate various purposes of the corporation. Principal among them is that KRCC was formed to provide mental health care; to serve as a regional mental health-mental retardation board; and to apply for, receive, and administer public and private funds. The articles are silent as to whether KRCC is to operate as an arm of the state or local government.

According to the minutes of KRCC's first board of directors meeting, "the [eight] County Judges . . . file[d] names for new mental health board members." Subsequent vacancies have been filled by a vote of the remaining directors. The minutes also offer an insight into the reason KRCC was organized. Prior to KRCC's incorporation, the Upper Kentucky River Regional Mental Health/Mental Retardation Comprehensive Care Center was responsible for providing mental health care to people living in the affected communities. Unnamed "local agencies" expressed concerns about the quality of mental health services being provided in the area due to staffing and personnel difficulties within the Board. In order to rectify the situation, the Kentucky Cabinet for Human Resources sent in a caretaker/administrator to run Upper Kentucky. In due course, Upper Kentucky dissolved, and KRCC was formed.

At KRCC's first meeting, the Deputy Commissioner for Mental Health of the Bureau for Health Services, "assured [the KRCC directors of] support from the [Kentucky] Cabinet for Human Resources." Within a few weeks, the Cabinet for Human Resources issued an administrative order stating:

> WHEREAS, Kentucky River Community Care, Inc. has submitted a request to the [Cabinet] for Human Resources to be recognized as a regional community mental health-mental retardation board pursuant to the provisions of KRS 210.370 to 210.480; and
>
> WHEREAS, Kentucky River Community Care, Inc. has expressed its intention to bring its board composition, by-laws, articles of incorporation and operations into compliance with all [Cabinet] for Human Resources standards as rapidly as possible;
>
> NOW, THEREFORE, by the authority vested in me by KRS 210.370 to 210.480 and 902 KAR 6:030(2) relating to regional mental health-mental retardation boards, I, Peter D. Conn, Secretary of the [Cabinet] for Human Resources, do hereby recognize Kentucky River Community Care, Inc. as the regional mental health-mental retardation board for the counties of Breathitt, Knott, Lee, Leslie, Letcher, Owsley, Perry, and Wolfe, contingent upon full compliance with all applicable laws, regulations and policies within one hundred and twenty days (120) from the effective date of this Order.

KRCC's bylaws refer to the provisions of the Kentucky Revised Statutes addressing mental health

and mental retardation services. The bylaws require the board of directors to "[r]eview and evaluate mental health and mental retardation services provided pursuant to KRS 210.370 to 210.480, and report thereon to the Secretary for Health Services. . . ." In addition, KRCC's board of directors must ensure that its programs comply with the regulations issued under Kentucky Revised Statutes sections 210.370 to 210.480. The bylaws also contain a provision requiring the board of directors to be representative of the counties KRCC serves as specified in Kentucky Revised Statutes section 210.380. Although referring to the statutory scheme, the bylaws, like the articles of incorporation, are silent as to whether KRCC was formed to act as an administrative arm of the state.

KRCC and the Kentucky Cabinet for Health Services, Department for Mental Health and Mental Retardation Services entered into a contract in which KRCC agreed to provide mental health services within its eight-county region. A separate contract governed the operations of the Caney Creek Rehabilitation Center. These contracts incorporated by reference the statutory scheme found in Chapter 210 of the Kentucky Revised Statutes. The contracts contained guidelines for the services KRCC provides and eligibility restrictions for patients. For example, KRCC must meet certain staffing requirements, submit budget proposals, and develop personnel policies. KRCC must comply with these provisions in order to receive state funding.

B.

Early in 1997, the Kentucky State District Council of Carpenters, AFL-CIO, an intervenor in this suit, petitioned the NLRB for certification as the collective bargaining representative for Caney Creek's 110 employees. There are four, 20-bed units at the facility, and each is staffed with five rehabilitation counselors and 10 rehabilitation assistants. Caney Creek employs six registered nurses and a licensed practical nurse to provide care throughout all the units. The facility is staffed 24 hours per day, with a full staff in place only on the first shift.

At the NLRB representation hearing, KRCC objected to union certification, claiming that it was a "political subdivision" within the meaning of section 2(11) of the NLRA, and therefore not an employer whose employees could be organized. KRCC also argued that even if it were not a political subdivision, its registered nurses and rehabilitation counselors could not be included in any proposed bargaining unit because these employees were supervisors. The NLRB conducted a hearing on the issues.

After the hearing, but before a decision was issued, KRCC moved to reopen the record, seeking to introduce certain evidence that had been excluded by the hearing officer. The additional evidence comprised information concerning the control or potential control by state agencies of KRCC's operations. The NLRB denied this request, concluding that the evidence at issue "went merely to the financial or administrative governmental control or potential control over its

operations," and that the decision of the hearing officer to exclude the proffered evidence was not prejudicial error.

The NLRB Regional Director then issued a decision and direction of election, rejecting KRCC's claim that it was a political subdivision and its claim that the registered nurses and rehabilitation counselors were supervisors. KRCC requested review of the Regional Director's decision, but the NLRB denied the request.

Shortly thereafter, an election was held, and the employees voted in favor of union representation. The Regional Director certified the Union as the exclusive collective-bargaining representative, but KRCC refused the Union's requests to bargain. The NLRB then issued a complaint alleging that KRCC's refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the NLRA. KRCC responded that the union certification was invalid because it is not an employer within the meaning of section 2(2) of the NLRA. The NLRB upheld the union certification, and found that KRCC's refusal to bargain was an unfair labor practice. The NLRB ordered KRCC to bargain with the Union. It is from this decision and order that KRCC now appeals.

II.

In an appeal from an NLRB decision, we review the board's legal conclusions *de novo* and its factual findings under a substantial evidence standard. *See NLRB v. Good Shepherd Home, Inc.*, 145 F.3d 814, 816 (6th Cir. 1998). We must consider the entire record to determine whether the NLRB's findings are supported by

substantial evidence. *See Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6th Cir. 1998).

III.

First, we must decide whether KRCC is a political subdivision: if it is, it is not an employer subject to the NLRA. 29 U.S.C. § 152(2). KRCC argues that the NLRB's decision that KRCC is not a political subdivision is not supported by substantial evidence. KRCC claims the NLRB incorrectly applied the test to determine whether it qualified as a political subdivision, and also that the hearing officer erroneously excluded evidence that would have helped KRCC substantiate its claim that it is an arm of the government.

A.

Section 2(2) of the NLRA excludes from the definition of employer "any State or political subdivision thereof." 29 U.S.C. § 152(2). The Supreme Court has held that an entity is exempt from the NLRA if it is either "(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604-05, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

In its decision and direction of election, the NLRB Regional Director applied the test articulated in *Natural Gas* and concluded that KRCC was not created as an arm of the state, and that KRCC was not administered by individuals who are responsible to public officials or the general electorate.

1.

To satisfy the first prong of the Natural Gas test, KRCC must show that it was created directly by the state, *and* that the state intended KRCC to operate as an arm of state government. KRCC claims it was created directly by the state, thus satisfying the first part of the test. In support, KRCC maintains that both state and county officials actively participated in creating KRCC; that a public official filed the articles of incorporation; that local government agencies requested the dissolution of KRCC's predecessor; and that county judges assisted in selecting KRCC's initial board of directors. KRCC argues that it would not exist but for the initiative of the various public officials involved.

In *Crestline Memorial Hospital Association v. NLRB*, 668 F.2d 243 (6th Cir. 1982), the hospital claimed exemption from the NLRA under the political subdivision exception. The city of Crestline leased facilities to Crestline Memorial Hospital on the condition that Crestline Memorial operate these facilities as a municipal general hospital. *See id.* at 244. This court rejected the hospital's contention, noting that the hospital could not have been "created by the state" because "it was and remains a private, nonprofit corporation . . . operating certain facilities leased from the City." *Id.* at 245.

The facts in *Crestline* are analogous to the situation we address here. KRCC is a private, nonprofit corporation, operating mental health and mental retardation facilities pursuant to contracts. There is nothing in KRCC's articles of incorporation to support its claim

that it was created by the state. Cooper filed the articles of incorporation as an individual, and the Commonwealth of Kentucky took no government action to create KRCC. Only after the corporation was formed did the Cabinet for Human Resources "recognize" it as a mental health-mental retardation board. We are satisfied that KRCC was not formed directly by the state, as required by the first prong of the *Natural Gas* test, and because we find it was not, it is unnecessary to address KRCC's next series of arguments that purport to show that the state intended KRCC to serve as an arm of the Kentucky government.

2.

We turn next to the alternative basis announced in *Natural Gas* for determining whether KRCC is a political subdivision of the state: whether, as KRCC claims, it is "administered by individuals who are responsible to public officials or to the general electorate." *Id.*

KRCC argues, first, that because the Secretary of the Cabinet for Human Resources has significant control over KRCC's operations, KRCC is an organization run by individuals responsible to public officials. Specifically, the Secretary has authority to appoint a caretaker for KRCC and make personnel changes without the consent of the corporation's board. In addition, the Secretary has authority to review and disapprove of the board's personnel policies and compensation plans. The Cabinet for Human Resources also dictates the services KRCC will provide and how many employees KRCC will need. Therefore, KRCC claims, it is responsible to the Secretary of the Cabinet for Human Resources.

To be sure, the Secretary of the Cabinet for Human Resources exercises significant oversight of KRCC's operations. The oversight arises because KRCC has sought recognition as a local mental health-mental retardation board, but it does not necessarily follow that such oversight means that the individuals in charge at KRCC are responsible to public officials. We find nothing in the oversight authority of the Cabinet for Human Resources or in the internal structure of the KRCC that makes the individuals in charge at KRCC responsible to the Cabinet for Human Resources.

Second, KRCC argues that the state controls the composition of KRCC's board of directors, and, therefore, the directors are answerable to the state, thus satisfying the second prong of the *Natural Gas* test. KRCC selects its board members in the fashion required by Kentucky law governing mental health-mental retardation boards. The statute specifies that the board of directors must be representative of the community the corporation serves. See Ky. Rev. Stat. § 210.380. The law also provides that the "appointing authority" may remove a board member for certain misconduct. See Ky. Rev. Stat. § 210.390. In the event of a vacancy on the KRCC board of directors, the remaining board members select a replacement.

In *Pikeville United Methodist Hospital of Kentucky, Inc. v. United Steelworkers of America, AFL-CIO-CLC*, 109 F.3d 1146 (6th Cir. 1997), this court addressed this second prong of the political subdivision test of *Natural Gas*, requiring responsibility to public officials. We concluded that the hospital administrators in *Pikeville* were not responsible to public officials, noting that "[n]o law or ordinance . . . requires that the

board of directors . . . be elected by the general populace or requires that those board members be public officials. . . ." *Id.* at 1151. We noted also that the city could not control the composition of the board of directors. *See id.*

Contrary to KRCC's assertions, neither any Kentucky public official nor the general public control the composition of KRCC's board of directors. KRCC complies with the state law requiring the board to be representative of the community served, but this is only because KRCC seeks to operate as a local mental health-mental retardation board.

Section 210.390 of the Kentucky Revised Statutes provides:

> . . . Any member of a board may be removed by the appointing authority for neglect of duty, misconduct or malfeasance in office, after being given a written statement of charges and an opportunity to be heard thereon.

Ky. Rev. Stat. § 210.390. KRCC asks us to read that provision as giving the state the power to remove directors. Considering that vacancies on the board are filled by a vote of the remaining board members, it is unlikely that the state is the "appointing authority." It is more likely that the board of directors itself is the appointing authority. However, we need not answer this question. Assuming *arguendo* that the state can remove a director for misconduct, we are not persuaded that KRCC is run by individuals responsible to public officials or to the general electorate. KRCC chose to subject itself to this regulation by becoming a local

mental health-mental retardation board. If KRCC ceased operating as a local board, the state would no longer have any influence over the board of directors.

Therefore, we conclude that substantial evidence supports the NLRB conclusion that KRCC was not created by the state and is not administered by individuals that are responsible to public officials or to the general electorate, as required by *Natural Gas*, 402 U.S. at 604-05, 91 S.Ct. 1746.

B.

KRCC next argues that the hearing officer should have permitted the introduction of evidence which would have helped establish that KRCC was created for a public purpose and show that the state retained control of its operations.

The proffered testimony spoke to the following points: the state's ability to effectuate change in personnel policies at KRCC; the state's authority to appoint a caretaker/administrator in emergency situations; the state's past appointment of caretakers; the requirement that the state review any collective bargaining agreement; and testimony from a legislator about the initial legislative rationale behind creation of the local boards. KRCC also proffered an affidavit from a former governor of Kentucky containing his thoughts and opinion that the boards are agencies of the state.

We review for an abuse of discretion the decision to exclude evidence. *Dayton Hudson Dep't Store Co. v. NLRB*, 79 F.3d 546, 552 (6th Cir. 1996). Insofar as the evidence the ALJ excluded relates to the state's

authority to effectuate change in personnel policies and to appoint a caretaker in emergencies, the record already contained the statutes and regulations supporting these. See Ky. Rev. Stat. § 210.440(3); 908 Ky. Admin. Regs. 2:020.2. Therefore, the decision to exclude this cumulative evidence cannot be said to have unfairly prejudiced KRCC. *See Segal v. Cook*, 329 F.2d 278, 280 (6th Cir. 1964).

The former governor's opinion as to whether KRCC is a political subdivision as defined by federal law, is manifestly an opinion on a matter of law, and therefore not competent evidence on the question. *See Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.*, 107 S.Ct. 1038, 94 L.Ed.2d 112 (1987). Testimony from a drafter of the Kentucky statutory scheme sheds no light on whether the Commonwealth of Kentucky formed KRCC to act as an arm of the government; nor is it instructive as to whether the individuals running KRCC are responsible to public officials or to the general electorate. All the testimony might have provided is one legislator's understanding of the meaning of the statute. Therefore, we reject KRCC's contention that the ALJ abused his discretion in excluding the proffered evidence.

IV.

KRCC maintains that even if it is an employer subject to the NLRA, the registered nurses and rehabilitation counselors it employs are supervisors and therefore exempt from the collective bargaining unit under 29 U.S.C. § 152(11). The NLRA applies to "employees." 29 U.S.C. § 152(3). Individuals employed

as supervisors are specifically excluded from the definition of employee. *See id.*

The NLRA defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Thus, an employee is a supervisor if he (1) has the authority to engage in one of the activities enumerated in section 152(11), (2) uses independent judgment in that activity, and (3) does so in the interest of the employer. *See Grancare*, 137 F.3d at 375. This definition is a substantively binding rule of law in this court that is no longer open to question.

In concluding that KRCC's registered nurses and rehabilitation counselors are not supervisors, the NLRB assigned the burden of proving supervisory status to KRCC. This ignores our repeated admonition that "[t]he [NLRB] has the burden of proving that employees are not supervisors." *Id.* KRCC claims the registered nurses and rehabilitation counselors exercise independent judgment in directing other employees, and do so in the interest of the employer. The Board found that they do not.

Although we have issued a number of opinions in the last year finding that nurses are supervisors, and rejecting the NLRB's stubborn insistence that they are not, we acknowledge that whether an employee is a supervisor is a highly fact-intensive inquiry, and therefore, each case must be scrutinized carefully.

A. Nurses

During some of the second and all of the third shift at Caney Creek—almost two thirds of the day—the registered nurses act as building supervisors. Although a registered nurse is the highest ranking employee in the building throughout these periods, an administrator is always "on call." According to Caney Creek's procedures, the registered nurses acting as building supervisors are "in charge of the facility and all rehabilitation staff." The building supervisor is responsible for patient care and must ensure adequate staffing. According to an internal memorandum in the record, the nurses acting as building supervisors at Caney Creek are authorized to shift staff between units and must "write up anyone who does not comply with the request immediately." In addition, the nurses have authority to call employees into work early or ask employees to remain on duty beyond the normal end of shift in the event of staff shortages, although the nurses do not have authority to force an employee to work in these situations. The registered nurses do not retain keys to the facility, although they have access to a set of keys that they must give to the security guard when he comes on duty.

The registered nurses are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case. The registered

nurses are also responsible for ensuring that the licensed practical nurses properly dispense patient medications. The registered nurses do not make the initial work schedules, but they are expected to deal with situations in which the facility might become shorthanded for any reason. A nurse, acting as building supervisor, could send an employee home, but the nurse would then need to inform that employee's immediate supervisor.

Our task is to decide whether these responsibilities call for the exercise of "independent judgment" under section 152(11). Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with "management." This court, however, has repeatedly rejected this interpretation, and found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts. *See Mid-America Care Foundation v. NLRB*, 148 F.3d 638, 641 (6th Cir. 1998).

In *Mid-America*, we addressed the NLRB's argument that this court should defer to the board's interpretation of "independent judgment." In reversing the NLRB's conclusion that nurses are not supervisors, we

held that the NLRB interpretation was not entitled to the normal deference given to agency interpretations of ambiguous provisions because the rule announced differed from the NLRB's actual application of this rule. *See id.* at 642.

> [W]hen an agency's *application* of a statutory interpretation (which itself ordinarily would be entitled to deference) frustrates judicial review by "subtly and obliquely" revising the stated interpretation to impose a more stringent definition or a higher standard of compliance in certain factual contexts, *Chevron* deference is inappropriate.

Id. (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 118 S.Ct. 818, 827-28, 139 L.Ed.2d 797 (1998) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). This court has continued to overturn NLRB decisions finding that nurses are not supervisors even though the nurses direct others in providing patient care, address scheduling shortages, and have some evaluative role with respect to other employees. This court, not the NLRB, is the ultimate interpreter of this statutory provision, and we again reject the NLRB's wooden and narrow definition of the term "independent judgment."

The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments. These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses. These duties are supervisory in nature, and there can be no doubt that these activities are conducted in the interest of the employer. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 577, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994). After a careful examination of the record, we conclude that the evidence readily establishes that Caney Creek's registered nurses are supervisors, and does not support the NLRB's decision to include them in the bargaining unit.

B. Rehabilitation Counselors

We turn finally to KRCC's claim that the rehabilitation counselors at Caney Creek are supervisors because they supervise the rehabilitation assistants. The job titles for the positions in question—rehabilitation counselor and rehabilitation assistant—would suggest, without more, some supervisory role for a counselor over an assistant. But it is the record evidence concerning their respective functions and their relationship to one another that is determinative.

When a patient enters the facility, a rehabilitation counselor evaluates the patient's needs and develops a comprehensive treatment plan, with the ultimate goal of helping the patient to become self-sufficient. This plan and any changes made to it must be approved by a psychiatrist. If the plan is approved, it is carried out on a daily basis primarily by the rehabilitation assistants.

The job description for rehabilitation counselors does not explicitly reference supervisory responsibilities;

however, it states that the counselors "[m]ay provide direction to assigned Rehabilitation Assistants and service provision to residents." Counselors must hold a bachelor's degree in a human services field; or an LPN certificate, together with 2 to 4 years of experience; or an associate's degree in nursing without licensure.

Rehabilitation counselors do not have any hiring responsibilities. If a counselor observes an assistant acting inappropriately, the counselor discusses the matter with the assistant and tries to resolve the issue without resort to any formal procedures. If that approach fails, in order to resolve the issue the counselor prepares an incident report, but the counselors do not have any disciplinary authority beyond the incident report. The rehabilitation counselors do not have the authority to transfer assistants between units, and have no authority to address a rehabilitation assistant's grievances.

The rehabilitation counselors do not schedule the assistants. Each morning, the counselors meet with the assistants and the assistants volunteer for particular tasks. A counselor may also ask an assistant to work for a shorthanded unit. The assistants report to the counselors at "informal team meetings" as to how a patient is progressing or participating in the program.

The job description form for rehabilitation assistants specifies that they report to a Treatment Assistant or a Treatment Coordinator. If a rehabilitation assistant has a problem with a patient, he contacts the counselor, and after a "back and forth" discussion, the counselor tells the assistant what to do. An assistant might also handle a problem with a patient on his own and then notify the proper person after the fact. The only

educational requirement is a high school diploma or GED.

The standards we have applied to the registered nurses apply with equal force to the rehabilitation counselors for determining whether the counselors are supervisors. The rehabilitation counselors must (1) have the authority to engage in one of the activities enumerated in section 152(11), (2) use independent judgment in that activity, and (3) do so in the interest of the employer. *See Grancare*, 137 F.3d at 375.

At KRCC, the primary function of the rehabilitation counselor is to design a patient treatment plan. This does not, of itself, involve any supervisory authority. Neither does the working relationship between the counselors and assistants imply any supervision of the work of the assistants by the counselors. The counselors do not hire or fire the assistants, and they do not assign the assistants to particular units or patients. The fact that the assistants carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors. The record reflects more of a cooperative relationship between the rehabilitation counselors and rehabilitation assistants, with each performing a distinct but complementary function. Therefore, we hold that substantial evidence supports the NLRB's decision that the rehabilitation counselors are not supervisors and therefore to include them in the bargaining unit.

V.

For all of the foregoing reasons, we hold (1) that KRCC is not a "political subdivision" within the mean-

ing of the NLRA; (2) that the registered nurses are supervisors within the meaning of the NLRA; and (3) that the rehabilitation counselors are not supervisors within the meaning of the NLRA.

KRCC's petition for review is GRANTED in part and DENIED in part, and the NLRB's petition for enforcement is GRANTED in part and DENIED in part.

NATHANIEL R. JONES, Circuit Judge, dissenting.

I concur with the majority's holding in all respects but one: that the registered nurses at KRCC are "supervisors" and thus exempt from coverage under § 2(11) of the NLRA, 29 U.S.C. § 152(11). Because I believe that the NLRB's conclusion to the contrary is supported by substantial evidence (*i.e.*, that the registered nurses are "employees" within the meaning of § 2(3) of the Act, 29 U.S.C. § 152(3)), I would vote to enforce the NLRB's Order. Accordingly, I respectfully dissent.

The majority correctly notes that the NLRB's factual findings must be affirmed if they are supported by substantial evidence. See *ante* at 455. But the majority fails to articulate precisely what "substantial evidence" is. As we have frequently held in Social Security disability cases—cases of agency review where the "substantial evidence" standard likewise controls—substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence. *See Cutlip v. Secretary of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994) (per curiam); *Brainard v. Secretary of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989) (per curiam); *see also Consolidated Edison Co. v.*

NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.*, 305 U.S. at 229, 59 S. Ct. 206; accord *Medical Rehabilitation Servs., P.C. v. Shalala*, 17 F.3d 828, 831 (6th Cir.1994) (*citing Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971)); *Brainard*, 889 F.2d at 681. If we determine, after reviewing the administrative record as a whole, that the NLRB's factual findings are supported by substantial evidence, those findings must be affirmed, even if substantial evidence exists in the record to support an opposite decision. *See Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc). A finding of substantial evidence thus mandates affirmance. *See Kirk v. Secretary of Health & Human Servs.*, 667 F.2d 524, 535-37 (6th Cir. 1981).

Having conducted the "highly fact-intensive inquiry" required by the majority, *ante* at 453, I would find the NLRB's determination—that the six registered nurses employed at KRCC are not supervisors—supported by substantial evidence. The NLRB found, in relevant part, as follows:

> The RNs do not receive any extra compensation for serving as "building supervisors" and do not have keys to the facility.
>
> * * *
>
> [T]he only extra responsibility assumed by the RNs when serving as "building supervisors" is to

obtain needed help if for some reason a shift is not fully staffed. In the event a shift is understaffed, the RNs on duty will first attempt to find a volunteer to stay over from among the employees on the proceeding [*sic*] shift. If a volunteer cannot be obtained from the employees on the preceding shift, the "building supervisor," using a list containing the names, telephone numbers and addresses of the employees, will attempt to reach an off- duty employee who lives nearby to come in and cover the shift. The "building supervisors" do not have any authority, however, to compel an employee to stay over or come in to fill a vacancy under threat of discipline.

It appears that the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives. The RNs may also complete incident reports, but so can any other employee. All incident reports are independently investigated by the nursing or unit coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved. Although [KRCC] asserts . . . that RNs can "write-up" employees, there is no evidence in the record that they have ever done so. . . .

* * *

The RNs in their normal capacity or as "building supervisors" do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action. They do not evaluate employees or take any action which would affect their employment status. Indeed, the RNs, including when they are serving as "building supervisors," for the most part, work independently and by themselves without any subordinates.

J.A., vol. II, at 297-98 (quotations in original). In my view, these well-reasoned findings unquestionably constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that the six RNs at KRCC are "employees" within the meaning of 29 U.S.C. § 152(3).

I would therefore hold that the collective bargaining unit at KRCC includes the six registered nurses, and vote to enforce the NLRB's July 10, 1997 Order in its entirety.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Case 9-CA-34926

KENTUCKY RIVER COMMUNITY CARE, INC. AND KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL—CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated, Washington, D.C. July 10, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on May 20, 1997, the General Counsel of the National Labor Relations Board issued a complaint on May 22, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9-RC-16837. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 11, 1997, the General Counsel filed a Motion for Summary Judgment. On June 13, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 27, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's determination in the representation proceeding that the Respondent is an employer within the meaning of Section 2(2) of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[1]

---

[1] In the underlying case, Member Higgins, without passing on the correctness of *Management Training Corp.*, 317 NLRB 1355 (1995), would have granted review with respect to the hearing officer's exclusion of testimony concerning the extent of control exercised by the state over the Respondent. See his dissenting opinion in *Aramark Corp.*, 323 NLRB No. 26 (Feb. 28, 1997).

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a private nonprofit corporation, has been engaged in mental health care and rehabilitation at its Hazard, Kentucky facility. During the 12-month period preceding the issuance of the complaint, the Respondent in conducting its business operations described above, derived gross revenues in excess of $250,000 and purchased and received at its Hazard, Kentucky facility, goods valued in excess of $2000 directly from sources outside the Commonwealth of Kentucky. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 20, 1997, the Union was certified on April 7, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

However, he agrees with his colleagues that no new matters are appropriately raised in the instant "technical" 8(a)(5) case and that summary judgment is therefore appropriate.

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Respondent at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since April 24, 1997, the Union has requested the Respondent to bargain, and, since May 15, 1997, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 15, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Kentucky River Community Care, Inc., Hazard, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Kentucky State District Council of Carpenters, AFL—CIO, United Brotherhood of Carpenters and Joiners of America, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following

appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Respondent at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hazard, Kentucky, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

---

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since May 20, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 10, 1997

William B. Gould IV Chairman

Sarah M. Fox Member

John E. Higgins, Jr. Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Kentucky State District Council of Carpenters, AFL—CIO, United Brotherhood of Carpenters and Joiners of America as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by us at our Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

KENTUCKY RIVER COMMUNITY CARE, INC.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-RC-16837

KENTUCKY RIVER COMMUNITY CARE, INC., EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

WILLIAM B. GOULD IV, CHAIRMAN

SARAH M. FOX, MEMBER

JOHN E. HIGGINS, JR., MEMBER

Dated, Washington, D.C., March 21, 1997.

---

[1] Member Higgins agrees to deny review on the issue of whether the Employer is a "political subdivision" within the meaning of Section 2(2) of the Act. However, without passing at this time on the correctness of *Management Training*, 317 NLRB 1355, Member Higgins would grant review with respect to the hearing officer's exclusion of testimony concerning the extent of control exercised by the state over the Employer. See *Aramark*, 323 NLRB No. 26 (dissenting opinion).

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CASE 9-RC-16837

IN THE MATTER OF
KENTUCKY RIVER COMMUNITY CARE, INC.,[1] EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

---

[1] The name of the Employer appears as amended at the hearing.

1. In a posthearing motion, the Employer objected to the conduct of the hearing and moved to reopen the record. At the hearing and in its motion, the Employer contends that the hearing officer erred by refusing to permit it to introduce evidence in support of its position that it is a political subdivision of the Commonwealth of Kentucky. Specifically, the Employer maintains that the hearing officer refused to allow it to introduce evidence, through witnesses and affidavits, with respect to its relationship to, and the control exercised over its operations by, the State.

The hearing officer ruled that the only relevant evidence was whether the Employer was a governmental entity or a political subdivision. Thus, she precluded certain evidence which went to the issue of the control or potential control of various agencies of the Commonwealth of Kentucky over the Employer's operations and limited the Employer to an offer of proof. I find that the hearing officer's ruling rejecting such evidence does not constitute prejudicial error. In reaching this conclusion, I note that the State statutes under which the Employer was established as well as the contracts between the Employer and the relevant State agencies are in the record and that the Employer's offer of proof went merely to the financial or administrative governmental control or potential control over its operations.

In *Management Training Corporation*, 317 NLRB 1355 (1995), the Board, in overruling *Res-Care, Inc.*, 280 NLRB 670 (1986), held that in determining whether to assert jurisdiction over an employer with close ties to a governmental entity it would consider only whether the employer meets the definition of "employer" under

Section 2(2) of the Act and the applicable monetary jurisdictional standards. The Board specifically held that it would no longer consider the control or potential control by a governmental department or agency over the operations of an employer in determining whether such employer was excluded from the term "employer" as defined in Section 2(11) [*sic*] of the Act as a governmental entity or political subdivision thereof. *Management Training Corporation*, 317 NLRB at 1358. Accordingly, the hearing officer properly rejected evidence on the control or potential control of the Employer's operations by various State agencies and her rulings on this issue and in all other respects are hereby affirmed and the Employer's motion to reopen the record is denied. See, *Mariah, Inc.*, 322 NLRB No. 114 (1996).

2. The Employer, a private nonprofit corporation with its principal office in Hazard, Kentucky, provides mental health care services to Kentucky residents at 25 separate sites throughout an 8-county region in the eastern portion of the State. The only facility involved in this proceeding is the Caney Creek Developmental Complex located at Pippa Passes, Kentucky which provides long-term care for severely ill mental residents. Contrary to the Petitioner, the Employer contends that it is exempt from the Board's jurisdiction as a governmental entity or political subdivision of the Commonwealth of Kentucky.

The record discloses that the Employer was incorporated on May 21, 1979 by Vernon Cooper, Jr. who was, at the time, chairman of the East Kentucky Health Planning Council. Cooper incorporated the Employer at the suggestion of the Secretary of the Cabinet of Hu-

man Resources. The Employer was incorporated pursuant to Chapter 273, et seq., of the Kentucky Revised Statutes (KRS). The Employer's operations appear to be, for the most part, governed by KRS Chapter 210, et seq., which authorizes the Cabinet of Human Resources to establish regional mental health and retardation boards to plan and administer grants for all local programs relating to mental health, mental retardation and alcohol and drug abuse. The enabling statute requires that the board of directors of any employer, which can apparently be either private or nonprofit, operating pursuant to KRS 210 be representative of the area served.

At the time the Employer was incorporated, the county judges for each of the eight counties covered by the Employer's jurisdiction appointed two members which made up the Employer's original board of directors. There are currently 20 board members, consisting of 2 individuals from each of the 8 counties served by the Employer and 4 at-large members. The board members serve a 4-year term and after the selection of the original board, vacancies on the board have been filled by applicants who are nominated and approved by current board members. The board members are not elected and are not responsible to any State official or entity. The board of directors appoints an executive director who has overall responsibility for directing the Employer's operations. The current executive director is Dr. Louise Howell, whose office is located at the Employer's headquarters in Hazard, Kentucky.

The Employer contracts with the Commonwealth of Kentucky (Department for Mental Health and Mental

Retardation) to provide the mental health services required by statute. The Employer currently has two contracts with the State. Its basic contract for all operations is effective July 1, 1996 through June 30, 1997. In addition, the Employer has a "price contract" to provide the mental health services required by the State at the Caney Creek Rehabilitation Complex. In this connection, I find noteworthy the fact that when the State initially sought an employer to provide services at Caney Creek, it solicited bids from several entities, including both private and nonprofit corporations.

The contracts between the Employer and the State provide specific guidelines with respect to the type of services to be provided and the individuals entitled to treatment by the Employer. In addition, the contracts mandate that the Employer meet certain staffing requirements and comply with certain employment guidelines. The Employer is required to submit a budget and a detailed staffing pattern to the State describing expenditures and employee benefits package, including employee health insurance, unemployment insurance, retirement plan, holidays, vacations and sick leave. The Employer is also required to develop and implement a personnel policy for its employees. Finally, the State performs periodic audits and investigations and apparently can even remove a member of the board of directors for malfeasance in office.

The Employer's operational plan and budget must be approved by the applicable State agency before the Employer can apply for State grants or receive any monies from the State Department of Health Services. In this connection, the record discloses that a sub-

stantial portion of the Employer's budget is comprised of State grants and monies. However, the Employer receives various Federal grants and some of its operational funds are obtained through Medicare, Medicaid and private reimbursement.

Although the Employer must meet various State imposed requirements and its budget and operational plan must be approved by applicable State agencies, the Employer is apparently free to recruit, hire, discharge and discipline its employees. The Employer also has the apparent freedom to establish its own job classifications and pay rates as long as they are within its overall budget. Finally, the Employer is administered by an independent board of directors. Although the board members apparently can be removed by the State for malfeasance in office, the current members of the board are not elected by the general public and are not responsible to any public official.

In determining whether to assert jurisdiction over an employer with close ties to an exempt government entity, the Board, for several years, applied principles enunciated in *Res-Care, Inc.*, supra. Under the *Res-Care* standards, the Board examined the control over essential terms and conditions of employment retained by both the employer and exempt entity to determine whether an employer was capable of engaging in meaningful collective bargaining. In *Management Training Corporation*, supra, the Board noted that the approach taken in *Res-Care* in determining whether to assert jurisdiction over employers with a relationship to exempt entities had resulted in confusion and lack of uniformity. Thus, in *Management Training Corporation*, supra, the Board overruled *Res-Care* and held that

in determining whether to assert jurisdiction over an employer with close ties to an exempt entity it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act and whether such employer meets the applicable monetary jurisdictional standards."

The record discloses that the Employer meets the definition of "employer" under Section 2(2) of the Act. In this connection, the Supreme Court has held that an employer is an exempt political subdivision under Section 2(2) of the Act if it is either (1) created as a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general public. *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). Although the Employer was established pursuant to a State statute and its budget, operational plan and staffing pattern must be approved by the applicable State agency, the Employer, contrary to its assertion at the hearing and in its brief, does not constitute a department or administrative arm of the State. The cases cited by the Employer in its brief in support of its position that the Employer was created as an administrative arm of the State, *Fayette Electric Co-Op, Inc.*, 308 NLRB 1071 (1992); *Western Paper Products, Inc.*, 321 NLRB No. 118 (1996); and *Madison County Mental Health Center, Inc.*, 253 NLRB 258 (1980), are clearly distinguishable. In *Fayette*, the Board found that the employer's governing board of directors, unlike here, was responsible to the general electorate. In *Western Paper*, the Board found that a state receiver was not a department or administrative arm of the state and asserted jurisdiction. The holding in *Western Paper* in no way

supports the Employer's position. Finally, in *Madison County*, the county established the employer and, unlike here, governed its entire operation, including its labor relations.

Moreover, the Employer is not administered by individuals who are responsible to public officials or the general electorate. The Employer is administered by an independent board of directors whose members are appointed for 4-year terms by the other board members. Although members apparently may be removed by the State for malfeasance in office, there is no evidence that they are directly responsible to any State agency or official. The cases cited by the Employer in its brief do not support its position that the Employer is administered by individuals responsible to public officials or the general public. The primary cases relied on by the Employer, *Lima and Allen County Community Action, Inc.*, 304 NLRB 888 (1991); *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990), are inapposite. In all three of these cases, unlike here, the majority of their boards of directors were responsible by law to public officials or the general electorate. In *Fayette*, the other Board case cited by the Employer, as previously noted, the employer's board of directors was directly responsible to the general electorate. Finally, the Supreme Court's decision in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra, cited by the Employer, merely sets forth the criteria for an employer to qualify as a political subdivision of a governmental entity and has no relationship to the facts in the instant case.

At the hearing and in its posthearing brief, the Employer contends that the law in this area is still unsettled and that the Board has changed its position on the issue at least three times in recent years. Thus, the Employer maintains that the control exercised by the State, particularly the State Cabinet of Human Resources, over its operations should be considered in determining whether to assert jurisdiction over its operations. However, the Employer has not cited, and I am not aware of, any case in which the Board has indicated that it may be considering revisiting the standards established in *Management Training Corporation*, supra, for determining whether to assert jurisdiction over an employer with a close relationship to an exempt entity. Finally, the Employer contends in its brief that if *Management Training* requires that jurisdiction be asserted over its operation it should be overruled. I am bound by Board law and do not have the authority, as suggested by the Employer in its brief, to overturn Board precedent.

Based on the foregoing and the entire record, I find that the Employer is an "employer" within the meaning of Section 2(2) of the Act. *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra; *Management Training Corporation*, supra; *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, 239 NLRB 3 (1978). Moreover, the parties stipulated that the Employer has gross annual revenues in excess of $250,000 and, during the past 12 months, purchased and received at its Kentucky facilities goods valued in excess of $2,000 directly from points outside the Commonwealth of Kentucky. Accordingly, the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to

assert jurisdiction herein. *Management Training Corporation*, supra; *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, supra.

3. The parties stipulated, and the record shows, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and it claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer's Caney Creek Rehabilitation Complex, herein called Caney Creek, is located at Pippa Passes, Kentucky and provides a wide range of services for residents who are suffering from severe mental illness. The Caney Creek facility employs approximately 110 professional and nonprofessional employees in a variety of job classifications. There is no history of collective bargaining affecting any of these employees.

The Petitioner seeks to represent essentially all professional and nonprofessional employees employed by the Employer at its Caney Creek facility in any unit or units found appropriate. The Employer is in apparent agreement that a unit of all professional and nonprofessional employees at the Caney Creek facility is appropriate for the purposes of collective bargaining. Contrary to the Petitioner, however, the Employer would exclude the 20 rehabilitation counselors and 6 registered nurses from the unit as supervisors within the meaning of Section 2(11) of the Act.

Caney Creek is an 80-bed facility consisting of two wings, each of which is divided into two 20-bed units. The 4 units are equally staffed with 5 rehabilitation counselors and 10 rehabilitation assistants. There are apparently no physicians or psychiatrists employed directly by the Employer and such medical services are apparently obtained through a contract arrangement. However, Caney Creek employees, six registered nurses (RNs) and a licensed practical nurse (LPN), provide various medical services for the entire facility. There are also three recreational assistants employed by Caney Creek who are responsible for providing the residents with recreational therapy. In addition to the employees engaged in direct resident care, the facility also employs an unknown number of kitchen, dining room, housekeeping and maintenance employees. The Caney Creek facility is staffed 24 hours per day, 7 days per week, but apparently is fully staffed only on the first shift.

The overall administrative responsibility for the Caney Creek is vested in the administrator, Leonard Echols, who reports to the Employer's executive director, Dr. Louise Howell who is located at the Employer's office at Hazard, Kentucky. Reporting to Echols is the assistant administrator, Peggy Mason; the two unit coordinators, one position being currently vacant and the other being filled by Mark Stone; the nursing coordinator, Alicia Cook; the medical records custodian, Lavenia Wright; the recreational counselor, Nathan Fugate; the department manager of housekeeping and maintenance, Edward Jacobs; and the kitchen supervisor, Deborah Beverly. In addition, the human resources director, Sharon Harris and accountant supervisor, Alisha Craft, and her assistant,

Elizabeth Pennington, who work out of the Employer's Hazard, Kentucky office, perform managerial, supervisory or clerical duties for Caney Creek as well as other facilities operated by the Employer.

The residents at Caney Creek are adult mentally handicapped individuals who are received from throughout the Kentucky psychiatric hospital system. The treatment provided at Caney Creek is based on a psychiatric rehabilitation activity program developed by Boston University and is designed to help the mentally retarded develop skills necessary to live independently and perhaps move into a normal community setting. Upon being accepted at Caney Creek, residents are assigned to one of the four units. After a resident is assigned to a unit, a rehabilitation counselor reviews the resident's medical history and, with input from family members, the rehabilitation assistant involved and medical and psychiatric personnel, prepares a detailed treatment plan which is submitted to the unit coordinator for approval. The individual treatment plan includes the goals to be achieved and the method of accomplishing the desired results. The treatment plan consists of an activity based program, including living care, social activity, money management and other activities designed to assist the resident perform to the maximum of his/her capabilities. The treatment plans are administered by the rehabilitation counselors along with the rehabilitation assistants in conjunction with medical and psychiatric personnel.

Rehabilitation Counselors:

The Caney Creek facility employs 20 rehabilitation counselors. There are five counselors on each of the four

treatment units and each counselor is assisted by two rehabilitation assistants. The counselors work primarily on the first shift and report to the unit coordinators. The parties stipulated that the rehabilitation counselors are professional employees. Although there is some record testimony that an LPN could, with training and experience, become a rehabilitation counselor, all current counselors have at least a batchelor's [*sic*] degree and some have or are currently pursuing a master's degree. Further, the treatment plans formulated by the rehabilitation counselors require the exercise of independent discretion which can only be obtained through a course of study in an institution of higher learning. Accordingly, I find, in agreement with the parties, that the rehabilitation counselors are professional employees.

Contrary to the Petitioner, the Employer contends that the rehabilitation counselors exercise supervisory authority over the rehabilitation assistants and are supervisors within the meaning of Section 2(11) of the Act. The rehabilitation counselors, as previously noted, develop and primarily administer the treatment plans for the residents. Each rehabilitation counselor is assigned to a specific number of residents for whom they are responsible. In addition to formulating and administering treatment plans, the rehabilitation counselors are responsible for conducting classes covering a wide range of subjects from living care and cooking to money management. Each rehabilitation counselor is assisted by two rehabilitation assistants. The rehabilitation assistants not only assist the counselors in administering treatment plans but are responsible for making sure residents are awakened on time, attend

scheduled classes, keep doctor's appointments and are bathed and dressed.

The rehabilitation counselors meet each morning and discuss the day's schedule. During these morning meetings, the counselors determine what services need to be performed during the day and how best to accomplish the necessary tasks. The rehabilitation counselors apparently designate certain tasks which can be performed by the rehabilitation assistants. Such assignments appear to be routine in nature and do not involve the exercise of independent judgment. In addition, rehabilitation counselors will occasionally ask a rehabilitation assistant to perform specific tasks during the day such as making sure a resident goes to class or keeps a doctor's appointment. However, there is no record evidence that the rehabilitation counselors in making such requests have any authority to compel that the assignments be completed.

The rehabilitation counselors do not have the authority to hire, fire, discipline or reward employees. Although they can note any problem they observe on an incident report, the record shows that any employee may complete such a report. All incident reports are independently investigated by a unit coordinator who determines what, if any, disciplinary action is warranted. The counselors do not evaluate the rehabilitation assistants and their input is not sought by the unit coordinator responsible for appraising the rehabilitation assistants. The rehabilitation counselors are evaluated on leadership qualities but apparently so are all other employees. Finally, the job description for the rehabilitation counselors contains a reference to supervisory responsibilities which is marked not applicable.

The records fails to establish that the rehabilitation counselors process any indicia of supervisory authority within the meaning of Section 2(11) of the Act. They do not have the authority to hire, fire, discipline, promote or evaluate employees and any assignment or direction which they may give other employees is routine in nature. The fact that the counselors formulate treatment plans which are administered in part by rehabilitation assistants does not make the rehabilitation counselors supervisors within the meaning of Section 2(11) of the Act. See, *Ten Broeck Commons*, 320 NLRB 806 (1996); *Providence Hospital*, 320 NLRB 717 (1996). In *Providence Hospital*, the Board specifically found that the mere authority to coordinate the work of similarly situated employees did not make an individual a supervisor. The Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, 114 S. Ct. 1778 (1994), cited by the Employer in its brief, does not require a contrary finding. In *Health Care*, the Supreme Court merely repeated [*sic*] the Board's "in the interest of the employer" test applied in the health care industry, but did not disturb the Board's trademark analysis in determining supervisory status. I also note that if the rehabilitation counselors were found to be supervisors within the meaning of the Act, there would be 20 supervisors for 40 employees. Such a supervisory/employee ratio is totally unrealistic and militates against finding the rehabilitation counselors to be supervisors. *Manor West, Inc.*, 313 NLRB 956 (1994); *First Western Building Services, Inc.*, 309 NLRB 591, 603 (1992); *Bay Area Los Angeles Express*, 275 NLRB 1063 (1985).

Based on the foregoing and the entire record, I find that the rehabilitation counselors are not supervisors

within the meaning of Section 2(11) of the Act. Accordingly, I shall include them in the unit.

Registered Nurses (RNs):

Caney Creek employs six RNs whom the Employer, contrary to the Petitioner, would exclude from the unit as supervisors within the meaning of Section 2(11) of the Act. There are two RNs on each of the three shifts. The RNs are responsible for dispensing medication to the residents and for providing any other medical services ordered by a resident's physician or psychiatrist.

The two RNs on duty during each shift are responsible for servicing the entire facility. The RNs assigned to the second and third shift also serve as "building supervisors" and the first shift RNs occupy this position on weekends. The RNs do not receive any extra compensation for serving as "building supervisors" and do not have keys to the facility. There are two somewhat conflicting undated documents setting forth the duties of the "building supervisors." The memorandum which all the RNs have apparently seen provides only that the "building supervisors" in the absence of all management officials, will call a "local" replacement employee in the event of a staff shortage utilizing "a list of employees with local employees highlighted." The memorandum relied on by the Employer in its brief, which at least some of the RNs have apparently never seen, provides that the "building supervisors," in addition to securing replacement employees, will be the first person contacted when on duty concerning "the building, staff, staffing and residents . . . and [are] ultimately responsible for quality patient care."

A careful review of the record and the briefs of the parties discloses that, regardless of which memorandum is now in effect, the only extra responsibility assumed by the RNs when serving as "building supervisors" is to obtain needed help if for some reason a shift is not fully staffed. In the event a shift is understaffed, the RNs on duty will first attempt to find a volunteer to stay over from among the employees on the preceding shift. If a volunteer cannot be obtained from the employees on the preceding shift, the "building supervisor," using a list containing the names, telephone numbers and addresses of the employees, will attempt to reach an off-duty employee who lives nearby to come in and cover the shift. The "building supervisors" do not have any authority, however, to compel an employee to stay over or come in to fill a vacancy under threat of discipline.

It appears that the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives. The RNs may also complete incident reports, but so can any other employee. All incident reports are independently investigated by the nursing or unit coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved. Although the Employer asserts in its brief that RNs can "write-up" employees, there is no evidence in the record that they have ever done so. Indeed, the only record evidence where an RN made a complaint about another employee it was apparently ignored. In this connection, one of the RNs reported that the LPN, with whom she worked, was abusive and had countermanded one of her orders. The

record does not disclose that any corrective action was taken against the LPN.

The RNs in their normal capacity or as "building supervisors" do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action. They do not evaluate employees or take any action which would affect their employment status. Indeed, the RNs, including when they are serving as "building supervisors," for the most part, work independently and by themselves without any subordinates.

It is well settled that the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status. See, *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 1390, 1393 (1989). This burden was not altered, when considering the status of registered nurses, by the Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, supra. In *Health Care*, which the Employer relies on its brief to support its position, the Supreme Court merely rejected the Board's finding that supervisory authority exercised in connection with patient care is not in the interest of the employer. However, the Supreme Court left intact the Board's traditional analysis of an individual's duties to determine whether the person possesses any indicia of supervisory authority within the meaning of Section 2(11) of the Act. After considering the Supreme Court's directives set forth in *Health Care*, the Board determined to apply the same test to registered nurses as is applicable to all other individuals in determining supervisory status. *Providence Hospital*, supra; *Ten*

Broeck Commons, supra. This analysis is consistent with the congressional intent in enacting Section 2(11) of the Act. In this connection, Congress emphasized that its intention was that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985).

Based on the foregoing, the entire record and careful review of the Employer's brief and cases cited therein, I find that the Employer has not met its burden of establishing that the RNs, even when serving as "building supervisors," are supervisors within the meaning of Section 2(11) of the Act. The fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status. *Ten Broeck Commons*, supra; *Northcrest Nursing Home*, supra; *Phelps Community Medical Center*, 295 NLRB 486 (1989). The other duties performed by the RNs relate merely to providing typical medical services. Finally, I note that the RNs here have far less authority than the nurses in *Providence Hospital*, supra, and *Ten Broeck Commons*, supra, who the Board found not to be supervisors. Accordingly, I find that the RNs, including the "building supervisors," are not supervisors within the meaning of Section 2(11) of the Act. I shall, therefore, include them in the unit.

In agreement with the position of the parties, I find that the licensed practical nurse and the recreational assistants share a sufficient community of interest with

the other employees to warrant their inclusion in the unit. Accordingly, I shall include them in the unit.

The parties stipulated and the record shows, that the executive director, *Dr. Louise Howell*; the administrator of the Caney Creek facility, *Leonard Echols*, the assistant administrator of Caney Creek, *Peggy Mason*; the unit coordinator, *Mark Stone*; the nursing coordinator, *Alicia Cook*; the recreational coordinator, *Nathan Fugate*, the department manager for housekeeping and maintenance, *Edward Jacobs*; the kitchen supervisor, *Deborah Beverly*; the human resources manager, *Sharon Harris*; and the accountant supervisor, *Alisha Craft*, have the authority to hire, fire or discipline employees or direct their work in a manner requiring the exercise of independent judgment and are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

The parties also stipulated that Elizabeth Pennington, an assistant to the accountant supervisor, Alisha Craft, should be excluded from the unit. The record discloses that Pennington is located at the Employer's Hazard, Kentucky office but performs some work for Caney Creek. However, there is no record testimony that she has any interest in common with any of the Caney Creek employees. In agreement with the stipulations of the parties, and as she lacks a community of interest with the other Caney Creek employees, I shall exclude *Elizabeth Pennington* from the unit.

Based on the foregoing and the entire record, including the agreements and stipulations of the parties, I find that a wall-to-wall unit of the Employer's professional and nonprofessional employees employed at

its Caney Creek Rehabilitation Complex may be appropriate for the purposes of collective bargaining. The Board, however, is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals unless a majority of the professional employees vote for inclusion in such unit. *Sonotone Corporation*, 90 NLRB 1236 (1950). Accordingly, to ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees, I shall direct separate elections in the following voting groups:

VOTING GROUP A

All employees, including the licensed practical nurse, recreational assistants and rehabilitation assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all professional employees, guards and supervisors as defined in the Act.

VOTING GROUP B

All professional employees, including rehabilitation counselors and registered nurses employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all other employees, and all guards and supervisors as defined in the Act.

The nonprofessional employees in Voting Group A will be polled to determine whether or not they desire to be represented for collective-bargaining purposes by the Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America.

The professional employees in Voting Group B will be asked two questions on their ballot:

(1) Do you wish to be included with nonprofessional employees in a single unit for purposes of collective bargaining?

(2) Do you wish to be represented for purposes of collective bargaining by Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America?

If a majority of the professional employees in Voting Group B vote "Yes" to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional employees in Voting Group A to decide the representative issue for the entire unit. On the other hand, if a majority of the professional employees in Voting Group B do not vote for inclusion, they will not be included with the nonprofessional employees and their votes on the second question will then be separately counted to determine whether they desire to be represented by the Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America in a separate professional unit.

Although my final unit determination is based, in part, on the results of the elections in the two voting groups, I now make the following findings in regard to the appropriate unit: (1) if a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, I find that the following employees constitute a unit appropriate for the purposes

of collective bargaining within the meaning of Section 9(b) of the Act:

All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

(2) if a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, I find that the following groups of employees constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(a) All employees, including the LPN, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all professional employees, guards and supervisors as defined in the Act.

(b) All professional employees, including rehabilitation counselors and registered nurses employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all other employees, and all guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the voting groups described above at the time and places set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before *February 28, 1997*. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by *March 7, 1997*.

Dated at Cincinnati, Ohio this 21st day of February 1997.

/s/ RICHARD L. AHEARN
RICHARD L. AHEARN, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-5885/5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO, INTERVENOR

[Filed: Jan. 27, 2000]

JUDGMENT

BEFORE: JONES, RYAN, and BATCHELDER, Circuit Judges

On October 4, 1999, we issued our decision enforcing in part and denying in part the National Labor Relations Board's order requiring Kentucky River Community Care, Inc. ("KRCC") to bargain with a union purporting to represent various KRCC employees. In

conformance with our October 4 opinion, we hereby ORDER AND ADJUDGE that:

1. KRCC is not a political subdivision; it is an employer subject to the National Labor Relations Act pursuant to 29 U.S.C. § 152(2).

2. The registered nurses employed by KRCC are supervisors as defined under 29 U.S.C. § 152(11) and, therefore, are not employees under the Act. Because the registered nurses are not employees, they are not proper members of the collective bargaining unit certified by the Board.

3. The rehabilitation counselors employed by KRCC are not supervisors as defined under 29 U.S.C. § 152(11) and, therefore, are employees under the Act. The rehabilitation counselors are proper members of the collective bargaining unit certified by the Board.

4. Upon request, KRCC, its officers, agents, successors, and assigns, shall bargain with the Kentucky State District Council of Carpenters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit defined as follows:

> All professional and nonprofessional employees, including rehabilitation counselors, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act

> (including, but not limited to, registered nurses).

5. The parties shall bear their respective costs, including attorney fees.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-5885/5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO, INTERVENOR

[Filed: Mar. 23, 2000]

ORDER

BEFORE: JONES, RYAN AND BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

Further, petitioner/cross-respondent's motion for this court to consider new evidence relevant to the petition for rehearing en banc is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

Supreme Court, U.S.
FILED
JUL 2 0 2000
CLERK

(2)

No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UNION RESPONDENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Of counsel:

CRAIG BECKER
14 West Erie Street
Chicago, IL 60610

THOMAS J. SCHULZ
(Counsel of Record)
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474
Counsel for the Kentucky State District Council of Carpenters

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

Beverly Enterprises, Mass., Inc., 165 F.3d 960 (D.C. Cir. 1999)	1
Beverly Enterprises, Minn., Inc. v. NLRB, 148 F.3d 1042 (8th Cir. 1998)	1
Beverly Enterprises-Pa., Inc. v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997)	1
Beverly Enterprises-Pennsylvania, Inc. v. NLRB, 202 F.3d 253 (3d Cir. 1999)	1
Beverly Enterprises, Va., Inc. v. NLRB, 165 F.3d 290 (4th Cir. 1999)	1, 3
Beverly Enterprises, W. Va., Inc., 165 F.3d 307 (4th Cir. 1999)	1, 2
Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1997)	2
Glenmark Associates, Inc. v. NLRB, 147 F.3d 333 (4th Cir. 1998)	2
Grancare, Inc. v. NLRB, 137 F.3d 372 (6th Cir. 1998)	2, 3
Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)	4
Lakeview Subacute Care Center v. NLRB, 178 F.3d 1279 (3d Cir. 1999)	1
Manor West, Inc. v. NLRB, 60 F.3d 1195 (6th Cir. 1995)	2
Mid-America Care Foundation v. NLRB, 148 F.2d 638 (6th Cir. 1998)	1

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Attleboro Associates, Ltd., 176 F.3d 155 (3rd Cir. 1999)	1, 2, 3
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	4
NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)	4
NLRB v. Grancare, 170 F.3d 662 (7th Cir. 1999) (en banc)	1, 3
NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994)	3
NLRB v. Hilliard Development Corp., 187 F.3d 133 (1st Cir. 1999)	1, 2
Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997)	1
Schnurmacher Nursing Home v. NLRB, 2000 WL 719507 (2d Cir. 2000)	1
VIP Health Services, Inc. v. NLRB, 164 F.3d 644 (D.C. Cir. 1999)	1
Statutes	
29 U.S.C. § 152(11)	4
29 U.S.C. § 160(f)	2
Miscellaneous	
Harrington, *et al., Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1992 Through 1998* (2000)	4

BRIEF OF THE UNION RESPONDENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Respondent Kentucky State District Council of Carpenters, AFL-CIO, supports the National Labor Relations Board's (NLRB) petition for a writ of certiorari.

A. A deep and pervasive split has developed among the circuits over whether the NLRB's approach to determining the supervisory status of nurses is correct.

The District of Columbia, First, Seventh, Eighth, and Ninth Circuits have sustained the Board's approach. *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999); *VIP Health Services, Inc. v. NLRB*, 164 F.3d 644 (D.C. Cir. 1999); *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *NLRB v. Hilliard Development Corp.*, 187 F.3d 133 (1st Cir. 1999); *NLRB v. Grancare*, 170 F.3d 662 (7th Cir. 1999) (en banc); *Beverly Enterprises, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548 (9th Cir. 1997). *But see Grancare*, 170 F.3d at 668 (Kanne, J., dissenting); *Providence*, 121 F.3d at 555 (Noonan, J., dissenting).

By contrast, the Second, Third, Fourth and Sixth Circuits have disagreed with the Board. *Schnurmacher Nursing Home v. NLRB*, 2000 WL 719507 (2d Cir. 2000); *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 202 F.3d 253 (3d Cir. 1999); *Lakeview Subacute Care Center v. NLRB*, 178 F.3d 1279 (3d Cir. 1999); *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999); *Beverly Enterprises, West Virginia, Inc. v. NLRB*, 165 F.3d 307 (4th Cir. 1999) (en banc); *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (en banc); *Mid-America Care Foundation v. NLRB*,

148 F.2d 638 (6th Cir. 1998); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998); *Grancare, Inc. v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *Manor West, Inc. v. NLRB*, 60 F.3d 1195 (6th Cir. 1995). *But see Attleboro*, 176 F.3d at 169 (Bright, J., dissenting); *Beverly Enterprises, Virginia*, 165 F.3d at 299 (Phillips, J., dissenting); *Grancare*, 137 F.3d at 377 (Moore, J., concurring in the judgment).

The fact that employers may petition for review of NLRB decisions wherever they transact business, 29 U.S.C. § 160(f), insures that the controversy over this issue will continue to consume agency and judicial resources unless it is resolved by this Court.

The importance of this issue, however, goes far beyond matters of judicial and administrative economy. As Judge Lynch recently observed:

> Whether mid-level care providers such as [a nursing home's] district and charge nurses are supervisors . . . is a significant legal issue that has divided the circuits. It is also an issue of some societal significance, affecting increasing numbers of people who will need nursing home care as the post World War II baby boomer generation ages. The issue is significant in part because labor costs in the health-care industry comprise a large portion of overall costs (estimated to be roughly 60% of hospital costs). The issue is important both to management, concerned with economic viability, and to employees, concerned about job security and workplace rights. [*Hilliard Development*, 187 F.3d at 137 (footnotes omitted).]

B. The division among the circuits in the nurse cases entails a fundamental disagreement concerning basic legal principles that threatens to spill over into cases arising in a wide variety of settings beyond the health care industry.

As the Board's petition for certiorari demonstrates, underlying the split in the Circuits over the specific question of the supervisory status of nurses are divisions among the Circuits on two legal issues of broad significance: (1) whether the Board's construction of the term "independent judgment" in the statutory definition of the term "supervisor" is consistent with the Act, *see Attleboro*, 176 F.3d at 163 ("split among the courts of appeals concerning whether the Board's interpretation of 'independent judgment' in LPN charge nurses cases is a reasonable construction of the NLRA"); *Beverly Enterprises, Virginia*, 165 F.3d at 298-99 ("To the extent that the [D.C., Eighth, and Ninth] circuits reach a different conclusion on the statutory meaning of independent judgment, however, we decline to follow their approach."); and (2) whether the Board's placement of the burden of proving supervisory status on the party alleging an employee is a supervisor is consistent with the Act, *see Grancare*, 137 F.3d at 379 (Moore, J., concurring).

Resolution of these important questions is critical to the enforcement of federal labor law.

1. The question of who is a supervisor arises in many representation cases, if for no other reason than the fact that the Board must draw a line between rank-and-file employees, who are eligible to vote, and their supervisors, who are not. The Circuits that reject the Board's conclusions regarding the supervisory status of nurses have departed from the rule of deference to agency construction of the ambiguous terms of a statute and thereby threaten the efficient administration of federal labor policy. *See NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 579 (1994) ("phrases in § 2 (11) such as 'independent judgment' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees").

By broadening the scope of review on the recurring issue of supervisory status, the approach of those Circuits that have

overruled the Board in the nurse cases fails to give effect to the principle that the Board's interpretations are "entitled to deference from the courts" if "rational and consistent" with the Act. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). Moreover, the impermissible broadening of the scope of judicial review impedes the expeditious resolution of disputes concerning representation and thereby defeats one of the central purposes of the Act.

2. The decisions of those Circuits that have overturned the Board on the nurse supervisor issue also threaten to drastically narrow the coverage of the Act contrary to the clear intent of Congress. Congress intended the Act to have broad coverage and its supervisory exclusion to be narrowly construed so that only those employees truly aligned with management are deprived of the protections of the Act. This is reflected in the statutory definition of "supervisor," 29 U.S.C. § 152(11), which distinguishes employees who exercise some authority over other employees from those who exercise "independent judgment" in doing so. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). Despite this clear indication of Congressional intent, the approach of those circuits that have classified nurses in various health care institutions as supervisors would exclude some forty percent of the care-giving staff in such institutions from the Act's protection. *See* Harrington, *et al.*, *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1992 Through 1998* 69 (2000).

CONCLUSION

For these reasons and those set forth in the NLRB petition, the petition, for a writ of certiorari should be granted.

Respectfully submitted,

Of counsel:

CRAIG BECKER
14 West Erie Street
Chicago, IL 60610

THOMAS J. SCHULZ
(Counsel of Record)
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474
Counsel for the
Kentucky State District
Council of Carpenters

(3)

No. 99-1815

Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

In The Supreme Court Of The United States

National Labor Relations Board, Petitioner

v.

Kentucky River Community Care, Inc., et al.,

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

Michael W. Hawkins
Counsel of Record
for Respondent
Kentucky River Community
Care, Inc.
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

17 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there exists a conflict among the court of appeals as to whether nurses are supervisors under the National Labor Relations Act ("Act") and, therefore, excluded from the Act?

2. Whether the Sixth Circuit's decision that the National Labor Relations Board ("NLRB") has the burden of proving that employees are not supervisors under the NLRA is a matter of such importance that it requires review by this Court?

CORPORATE DISCLOSURE STATEMENT SUBMITTED PURSUANT TO S.CT. RULE 29.6

Respondent Kentucky River Community Care, Inc. ("KRCC") has no parent corporation and there is no publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT SUBMITTED PURSUANT TO S.CT. RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REASONS FOR DENYING WRIT 1

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THERE IS NO CONFLICT AMONG THE COURT OF APPEALS AS TO WHETHER NURSES CONSTITUTE "SUPERVISORS" UNDER THE NATIONAL LABOR RELATIONS ACT ("ACT") AND, THEREFORE, EXCLUDED FROM THE ACT. 1

II. THE SIXTH CIRCUIT'S DECISION THAT THE NLRB HAS THE BURDEN OF PROVING THAT EMPLOYEES ARE NOT SUPERVISORS UNDER THE NLRA IS NOT A MATTER OF SUCH IMPORTANCE THAT IT REQUIRES REVIEW BY THIS COURT. 7

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Page

Cases

Beverly Enterprises v. N.L.R.B., 148 F.3d 1042 (8th Cir. 1998) 5

Beverley Enterprises-Pennsylvania, Inc. v. N.L.R.B., 129 F.3d 1269 (D.C. Cir. 1997) 5

Beverly Enterprises, Virginia v. N.L.R.B., 165 F.3d 290 (4th Cir. 1999) 4, 7

N.L.R.B. v. Health Care & Retirement Corporation of America, 511 U.S. 571, 114 S.Ct. 1778 (1994) 8

Health Care & Retirement Corp. of America. v. N.L.R.B., 987 F.2d 1256 (6th Cir. 1993) 8

Integrated Health Services Of Michigan, At Riverbend, Inc., 191 F.3d 703 (6th Cir. 1999) 5

Kentucky River Community Care v. N.L.R.B., 193 F.3d 444, 453 (6th Cir. 1999), rehearing and suggestion for rehearing en banc denied (6th Cir. 2000) 6, 7

N.L.R.B v. Attleboro Associates, Ltd., 176 F.3d 154 (3d. Cir. 1999) 4

N.L.R.B v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999) 4

N.L.R.B. v. Hilliard Development Corporation, 187 F.3d 133 (1st Cir. 1999) 5

Providence Alaska Medical Center v. N.L.R.B., 121 F.3d 548 (9thCir. 1997) 4

Schnurmacher Nursing Home v. N.L.R.B., 2000 WL 719507 (2d Cir. 2000) 2, 3, 6

Rules and Statutes

National Labor Relations Act ("NLRA") 29 U.S.C. § 152(11) 1, 2, 3

S.Ct. Rule 29.6 ii

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THERE IS NO CONFLICT AMONG THE COURT OF APPEALS AS TO WHETHER NURSES CONSTITUTE "SUPERVISORS" UNDER THE NATIONAL LABOR RELATIONS ACT ("ACT") AND, THEREFORE, EXCLUDED FROM THE ACT.

Different factual scenarios in each case addressed in the National Labor Relations Board's ("NLRB") Petition For A Writ Of Certiorari account for the NLRB's allegation that a "conflict" exists among the courts.

Contrary to the NLRB's allegations, there is no "conflict" or "split" among the court of appeals as to whether nurses constitute "supervisors" under the Act. The NLRB alleges that this "conflict" among the court of appeals results from some of the court of appeals rejecting the Board's interpretation of "independent judgment" as used in defining a supervisor under § 2(3) of the Act, 29 U.S.C. § 152(11), and other court of appeals upholding the Board's interpretation of this term. Specifically, in its Petition For A Writ Of Certiorari, the Board stated:

> The Sixth Circuit's rejection of the Board's interpretation of "independent judgment," although consistent with decisions of the Third and Fourth Circuits, directly conflicts with decisions of the D.C, First, Seventh, Eighth and Ninth Circuits, which have accepted the Board's interpretation. [Citations omitted].

See NLRB's Petition at 19.

Yet, different factual scenarios in each case account for the NLRB's allegation that a "conflict" exists among the court of appeals. The fact that different factual scenarios account for the different holdings is best exemplified by the most recent court of appeals decision addressing the issue of whether nurses are supervisors under the Act - Schnurmacher Nursing Home v. N.L.R.B., 2000 WL 719507 (2d Cir. 2000).

In Schnurmacher, the Second Circuit upheld the Board's interpretation of "independent judgment" with respect to certain duties of the nurses at issue, and rejected the Board's interpretation of "independent judgment" with respect to other duties of the same nurses.[1] Specifically, the Second Circuit overturned

---

[1] To be deemed a supervisor under § 2(11) of the Act, an employee must have authority to engage in one of 12 specified supervisory functions (i.e., hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, responsibly to direct them,

the Board's decision that the charge nurses at issue did not exercise "independent judgment" when responsibly directing certified nurse assistants ("CNAs") in providing necessary patient care. Schnurmacher, 2000 WL 719507, *7. Yet, the Second Circuit upheld the Board's decision that the same charge nurses did not exercise "independent judgment" when they assigned CNAs to patients and scheduled their break times. Id. at *5. Notably, no where in the Schnurmacher decision did the Second Circuit refer to or acknowledge a "split" or "conflict" among the circuit court of appeals over the issue at hand. Id.

The fact that different factual scenarios account for the alleged "conflict" among the courts is also exemplified by the fact that the cases alleged to be in conflict by the NLRB vary as to the type of nurses involved (e.g., licensed practical nurses, registered nurses, and/or charge nurses.), the setting in which the nurses operate (e.g., hospital, nursing home, mental health care facility, acute care hospital, "subacute" nursing care facility) and the particular duties and responsibilities of each nurse involved (e.g., existence of disciplinary and/or scheduling authority, etc.). See Schnurmacher, 2000 WL 719507 at *1-2 (15 RN and

---

adjust their grievances, or effectively to recommend such action) and must exercise that authority "in the interest of the employer," using "independent judgment." 29 U.S.C. § 152(11).

LPN nurses at a 245-bed nursing home whose responsibilities included, among other things, directing CNAs in providing necessary patient care and assigning CNAs to patients and scheduling their break times); N.L.R.B v. Attleboro Associates, Ltd., 176 F.3d 154 (3d. Cir. 1999) (24 LPNs at a 180-bed nursing home whose responsibilities included, among other things, recommending discipline for CNAs, adjusting CNAs' grievances, assigning tasks to CNAs, and responsibly directing CNAs in completing their duties effectively); Beverly Enterprises, Virginia v. N.L.R.B., 165 F.3d 290 (4th Cir. 1999) (6 LPNs in a 50-bed nursing home whose responsibilities included, among other things, deciding which nursing assistants work where, whether a nursing assistant's misbehavior warrants sending the nursing assistant home, and whether exigent circumstances require an evacuation of the nursing home); N.L.R.B v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999) (38 LPNs in a 282-bed nursing home whose responsibilities included, among other things, transferring CNAs to other wings within the facility when necessary, determining whether CNAs complete their tasks properly and in accordance with patient care requirements, performing CNA evaluations, issuing commendations to CNAs, and rearranging CNA break times); Providence Alaska Medical Center v. N.L.R.B., 121 F.3d 548 (9thCir. 1997) (25% of the approximately 700 RNs in a 341-bed acute care hospital whose responsibilities included,

among other things, determining whether facility is overstaffed or understaffed, approving breaks of other nurses, and filling out evaluations for other nurses); Beverly Enterprises v. N.L.R.B., 148 F.3d 1042 (8th Cir. 1998) (4 RNs and 10 LPNs employed as team leaders in a 54-bed nursing home whose responsibilities included, among other things, altering break schedules and patient care priorities, seeking volunteers to fill shift vacancies created when the registered nursing assistants (NAR) are absent, initialing NAR time cards, and reporting disciplinary problems); Integrated Health Services Of Michigan, At Riverbend, Inc., 191 F.3d 703 (6th Cir. 1999) (50 RNs and LPNs in a 157-bed "subacute" nursing care facility, whose responsibilities included, among other things, distributing the competency evaluated nursing assistants' ("CENA") work assignments, authorizing the CENAs' breaks and lunches, and engaging in certain disciplinary actions with respect to the CENAs); N.L.R.B. v. Hilliard Development Corporation, 187 F.3d 133 (1st Cir. 1999) (13 RNs and LPNs in a 112-bed residential nursing home for residents with mental illnesses whose responsibilities included, among other things, assigning work to the Mental Health Assistants ("MHAs"), adjusting the MHAs' grievances, and disciplining the MHAs); Beverley Enterprises-Pennsylvania, Inc. v. N.L.R.B., 129 F.3d 1269 (D.C. Cir. 1997) (LPNs whose responsibilities included, among other things, passing

medication, stocking the medical supply cart, accompanying doctors on rounds and occasionally offering evaluations of the CNAs).

Moreover, the Second Circuit in Schnurmacher rejected the suggestion that "charge nurse" is a term of art with a nationwide agreed-upon meaning and that its decision involved a significant dispute over an issue of law. Schnurmacher, 2000 WL 719507, *8, n.2. Instead, the Second Circuit held that its decision was based solely upon a factual record concerning the case at hand and did not purport to vest the title "charge nurse" with any legal significance detached from the actual responsibilities similar to those entrusted to charge nurses at the case at hand. Id. Such a finding further confirms that different factual scenarios, and not a court of appeals dispute over the definition of "independent judgment," account for the different court of appeals' decisions involving the supervisory status of nurses under the NLRA.

Further, as the Sixth Circuit stated in the opinion below ". . . we acknowledge that whether an employee is a supervisor is a highly fact-intensive inquiry, and therefore, each case must be scrutinized carefully." Kentucky River Community Care v. N.L.R.B., 193 F.3d 444, 453 (6th Cir. 1999), rehearing and suggestion for rehearing en banc denied (6th Cir.

2000).[2]

II. THE SIXTH CIRCUIT'S DECISION THAT THE NLRB HAS THE BURDEN OF PROVING THAT EMPLOYEES ARE NOT SUPERVISORS UNDER THE NLRA IS NOT A MATTER OF SUCH IMPORTANCE THAT IT REQUIRES REVIEW BY THIS COURT.

Finally, the NLRB alleges that the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is a matter of such importance that it requires review by this Court. However, the NLRB's allegation is erroneous. This is best demonstrated by this Court's

---

[2] This case was the first case that the NLRB sought review by this Court concerning the alleged "conflict." Notably, the NLRB chose to seek review with respect to the Respondent, whose interest and resources to litigate this issue is very small compared to other potential respondents in this alleged "conflict" - e.g., Beverly Enterprises. See Beverly Enterprises, Virginia, Incorporated v. N.L.R.B., 165 F.3d 290 (4th Cir. 1999). This is best demonstrated from the facts that Respondent's RNs only constitute 6 of the 110 bargaining unit members and the main issue is this case was whether the Respondent constituted a "political subdivision" under the NLRA. See Kentucky River Community Care v. N.L.R.B., 193 F.3d at 453.

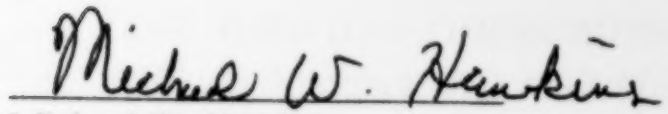
affirmative of the Sixth Circuit's decision in Health Care & Retirement Corp. of America v. N.L.R.B., 987 F.2d 1256 (6th Cir. 1993).

In Health Care & Retirement Corp., the Sixth Circuit held that the NLRB had the burden to prove the supervisory status of staff nurses in a nursing home. Health Care & Retirement Corp., 987 F.2d at 1259, 1261. Specifically, the Sixth Circuit stated, "Neither the ALJ's decision nor the Board's Order recognized that the burden rested not on HCR [the employer] but on respondent [the NLRB]. A burden which was not met." This Court affirmed the Sixth Circuit's decision in N.L.R.B. v. Health Care & Retirement Corporation of America, 511 U.S. 571, 114 S.Ct. 1778 (1994). In doing so, this Court made no mention, nor did it disapprove, of the fact that the Sixth Circuit placed the burden to prove the supervisory status of the nurses on the NLRB. Accordingly, the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is not a matter of such importance that it requires review by this Court.

CONCLUSION

This case does not warrant review by this Court. First, there is no conflict among the court of appeals as to whether nurses are supervisors under the NLRA. Second, the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is not a matter of such

importance that it requires review by this Court.



Michael W. Hawkins
Counsel of Record
for Respondent
Kentucky River Community
Care, Inc.
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Supreme Court, U.S.
FILED
AUG - 2 2000
CLERK

No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LEONARD R. PAGE
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

Cases:

Beverly Enters., Va., Inc. v. *NLRB*, 165 F.3d 290 (4th Cir. 1999) 2, 3, 4

Grancare, Inc. v. *NLRB*, 137 F.3d 372 (6th Cir. 1998) 3

Integrated Health Servs. v. *NLRB*, 191 F.3d 703 (6th Cir. 1999) 2

NLRB v. *Attleboro Assocs., Ltd.*, 176 F.3d 154 (3d Cir. 1999) 2, 3

NLRB v. *Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999) 3, 5

NLRB v. *Health Care & Retirement Corp.*, 511 U.S. 571 (1994) 5, 6

Providence Alaska Med. Ctr. v. *NLRB*, 121 F.3d 548 (9th Cir. 1997) 3

Schnurmacher Nursing Home v. *NLRB*, 214 F.3d 260 (2d Cir. 2000) 2, 4, 5

Statute:

National Labor Relations Act, § 2 (11), 29 U.S.C. 152(11) 1, 6

In the Supreme Court of the United States

No. 99-1815

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

As we explain in our petition for a writ of certiorari, this Court's review is needed to resolve conflicts among the courts of appeals on two important questions: First, whether the National Labor Relations Board (Board) has reasonably interpreted the term "independent judgment" in the definition of "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11). And, second, whether the Board reasonably requires the party who alleges that an individual is a "supervisor" to bear the burden of proving the individual's supervisory status. With regard to the first of those questions, respondent

contends that there is no conflict among the courts of appeals. With regard to the second question, respondent does not dispute that there is a conflict, but contends that the question is not sufficiently important to warrant this Court's review. Both of respondent's contentions are incorrect.

1. As we have explained (Pet. 2, 13), an employee is a supervisor under Section 2(11), and thereby excluded from the rights and protections afforded by the Act, only if he has authority to engage in one of 12 specified supervisory functions and exercises that authority using "independent judgment." 29 U.S.C. 152(11). The Board has interpreted the term "independent judgment" to exclude ordinary professional or technical judgment that an employee exercises in directing less-skilled employees to deliver services in accordance with employer-specified standards. See Pet. 4, 13.

The courts of appeals are divided on the legal question whether the Board's interpretation of "independent judgment" is a reasonable construction of the Act entitled to judicial deference. See Pet. 19-21. In reviewing the Board's application of its interpretation in cases concerning the supervisory status of nurses, five courts of appeals have upheld the Board's interpretation, and four courts of appeals have rejected that interpretation. See *ibid.*; pp. 4-5, *infra* (discussing *Schnurmacher Nursing Home* v. *NLRB*, 214 F.3d 260 (2d Cir. 2000)). The conflict has been noted by the courts of appeals (and individual judges),[1] and the issue

[1] See *NLRB* v. *Attleboro Assocs., Ltd.*, 176 F.3d 154, 163 (3d Cir. 1999); *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 298-299 (4th Cir. 1999) (en banc); *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 713 (6th Cir. 1999) (Jones, J., concurring); *Beverly Enters.*, 165 F.3d at 299 & n.1 (Phillips, J., dissenting).

has spawned dissenting opinions on both sides of the debate.[2] Indeed, courts on both sides of the issue have invoked the dissenting opinions of judges in other circuits in support of their respective positions.[3]

Respondent thus errs in contending (Br. in Opp. 1-6) that the disagreement among the courts of appeals reflects nothing more than differences in particular facts, such as "the type of nurses involved" and "the setting in which the nurses operate" (*id.* at 3), in each case. Rather, on essentially similar facts, some courts have rejected the Board's interpretation of "independent judgment" and therefore concluded that the nurses at issue are supervisors, yet other courts have accepted the Board's interpretation and concluded that the nurses involved are not supervisors.[4] As Judge

[2] See *Attleboro*, 176 F.3d at 170-172 (Bright, J., dissenting) (urging deference to Board's interpretation); *Beverly Enters.*, 165 F.3d at 299-303 (Phillips, J., dissenting) (same); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 381-382 (6th Cir. 1998) (Moore, J., concurring in the judgment) (same); *NLRB* v. *Grancare, Inc.*, 170 F.3d 662, 668-670 (7th Cir. 1999) (en banc) (Kanne, J., dissenting) (urging rejection of Board's interpretation); *Providence Alaska Med. Ctr.* v. *NLRB*, 121 F.3d 548, 555-556 (9th Cir. 1997) (Noonan, J., dissenting) (same).

[3] See *Grancare*, 170 F.3d at 667 (deferring to Board's interpretation and expressing agreement with Judge Phillips' "persuasive" dissent in *Beverly Enters.*); *Attleboro*, 176 F.3d at 168 (rejecting Board's interpretation and expressing agreement with Judge Noonan's dissent in *Providence Alaska*).

[4] For example, in *Attleboro*, the Third Circuit rejected the Board's interpretation of "independent judgment" (176 F.3d at 166-168) and concluded that licensed practical nurses (LPNs) serving as "charge nurses" at a nursing home were supervisors because they "set[] daily assignments" and "direct[ed] the [aides] in their daily duties" (*id.* at 166). By contrast, in the Seventh Circuit's *Grancare* decision, the court upheld the Board's interpretation of "independent judgment" (170 F.3d at 666-668) and

Phillips has noted, "there is a sufficiently common pattern respecting [the nurses'] assignment, directive, and disciplinary activities that makes it obvious that the different results turn not on any significant factual differences, but on the way 'independent judgment' is construed and back of that, on the judicial deference owed the Board's construction." *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 299 n.1 (4th Cir. 1999) (en banc) (dissenting opinion).

Respondent is also mistaken in asserting (Br. in Opp. 2-3) that the Second Circuit's decision in *Schnurmacher*, *supra*, supports respondent's contention that "different factual scenarios account for the different holdings" (Br. in Opp. 2) among the courts of appeals. Rather, the decision in *Schnurmacher* confirms that the outcome in a particular case is governed by the interpretation of "independent judgment" applied by the court deciding the case. In *Schnurmacher*, the court of appeals concluded, contrary to the Board, that a nurse exercises "independent judgment" under Section 2(11) when she "makes a judgment as to the need for certain actions based on specialized knowledge and experience" and has responsibility "to see that others do what is required by that judgment." 214 F.3d at 268. The Second Circuit thereby rejected the Board's view that "independent judgment" does not encompass ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards, and its decision has deepened the conflict among the courts of appeals.

---

concluded that LPN "charge nurses" at a nursing home were not supervisors even though they were "expected to 'take charge' by directing the [aides]" (*id.* at 664) and had "some assignment, scheduling, and disciplinary powers over [them]" (*id.* at 668).

Respondent is also incorrect in suggesting that the *Schnurmacher* court's statement that its decision was based "solely upon [the] factual record" and its disclaimer of the intent to "vest the title 'charge nurse' with any legal significance" (214 F.3d at 269 n.2) demonstrate that the discord among the courts of appeals results only from "different factual scenarios." Br. in Opp. 6. As we have explained, notwithstanding the disclaimer, the Second Circuit's conclusion that the nurses at issue were supervisors was based on its rejection of the Board's interpretation of "independent judgment." It is thus not surprising that courts that have accepted the Board's interpretation have, on similar facts, concluded that the nurses at issue were not supervisors. See, *e.g.*, *Grancare*, 170 F.3d at 664, 666-668 (discussed in note 4, *supra*).[5]

2. With regard to the conflict among the courts of appeals on the proper allocation of the burden of proving supervisory status, respondent mistakenly asserts (Br. in Opp. 7-8) that this Court's decision in *NLRB* v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), demonstrates that the conflict is not "a matter of such importance that it requires review by this Court" (Br. in Opp. 7). Although respondent attempts to make

---

[5] Respondent also mistakenly suggests that the decision in *Schnurmacher* turned merely on the facts of the case because the court of appeals, elsewhere in its opinion, upheld the Board's determination that the nurses did not exercise independent judgment insofar as "they assigned [aides] to patients and scheduled their break times" (Br. in Opp. 3). The court reached that conclusion not based on the Board's distinction between directions entailing the exercise of ordinary professional and technical judgment and those entailing the exercise of managerial judgment, but because the assignment and scheduling decisions were generally based on "prior practice." See 214 F.3d at 266.

much of the fact that the Court in *HCR* "made no mention" (*id.* at 8) of the burden-of-proof issue, the Court did not address that issue simply because the issue was not before the Court.[6]

As we have explained (Pet. 21-25), the Sixth Circuit's rule that the Board invariably bears the burden of proving that an individual is not a supervisor conflicts with the position of other courts of appeals on that question, which is both of general importance in the administration of the National Labor Relations Act and of decisive importance in this case. Accordingly, this Court's review of that question is warranted.

For the foregoing reasons, and the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LEONARD R. PAGE
General Counsel
National Labor Relations Board

AUGUST 2000

---

[6] Although the Board had sought certiorari on the burden-of-proof issue in *HCR*, the Court's grant of certiorari was limited to the question of the validity of the Board's interpretation of Section 2(11)'s phrase "in the interest of the employer." See 511 U.S. at 576; see also 510 U.S. 810 (1993). The Board acknowledged in its petition for certiorari in *HCR* that the allocation of the burden of proof was not determinative of the outcome in that case, but the Board nonetheless urged review of the issue on the ground that the Sixth Circuit would adhere to its position in future cases. See Pet. 20 n.13, *HCR, supra* (No. 92-1964). As we have explained (Pet. 23-25), the burden-of-proof issue is of decisive importance in this case.

No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD., PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

MICHAEL W. HAWKINS
Dinsmore & Shohl LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513)-977-8200
Counsel of Record
for Respondent
Kentucky River
Community Care, Inc.

THOMAS J. SCHULZ
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474
Counsel of Record
for Respondent
Kentucky State District
Council of Carpenters

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Counsel of Record
for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED MAY 12, 2000
CERTIORARI GRANTED SEPTEMBER 26, 2000

TABLE OF CONTENTS

	Page
National Labor Relations Board, Docket Entries	1
United States Court of Appeals for the Sixth Circuit, Docket Entries	3
Transcript of Proceedings, National Labor Relations Board, Feb. 11, 1997	5
Procedure: For Building Supervision (Employer Exhibit 13)	62
Memorandum from Carol Sincaglia to All Nurses, dated Aug. 23, 1996 (Employer Exhibit 14).....	63
R/N-Building Supervisor Duties (Union Exhibit 1)	64
Request for Proposal, Eighty (80) Bed Personal Care Home for Adults and Severe Mental Illinois, dated May, 1994 (Joint Exhibit 4)	65

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 9-RC-16837

IN THE MATTER OF
KENTUCKY RIVER COMMUNITY CARE, EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, PETITIONER

DOCKET ENTRIES

DATE	DOCKET ENTRY
1/27/97	Representation petition filed
2/10/97	Hearing opened
2/11/97	Hearing closed
2/21/97	Decision and direction of election filed
3/6/97	Respondent's request for review filed
3/21/97	Board's order denying review filed
4/7/97	Certification of Representative filed

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 9-CA-34926

KENTUCKY RIVER COMMUNITY CARE, INC.,
AND KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO,UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, PETITIONER

DOCKET ENTRIES

DATE	DOCKET ENTRY
5/20/97	Unfair labor practice charge filed
5/22/97	Complaint and notice of hearing filed
6/4/97	Answer filed
7/10/97	Board's decision and order filed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-5885, 97-5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL
OF CARPENTERS, AFL-CIO, INTERVENOR

DOCKET ENTRIES

DATE	DOCKET ENTRY
7/17/97	Petition for review filed
8/11/97	Cross-application for enforcement filed
8/29/97	Response to application for enforcement filed
10/4/99	Decision of the court of appeals filed

DATE	DOCKET ENTRY
1/27/00	Judgment of the court of appeals entered
2/24/00	Petition for rehearing with suggestion for rehearing en banc filed
3/16/00	Motion to consider new evidence filed
3/23/00	Petition for rehearing with suggestion for rehearing en banc and motion to consider new evidence denied
3/31/00	Mandate of court of appeals issued

NATIONAL LABOR RELATIONS BOARD

Case No. 9-RC-16837

IN THE MATTER OF
KENTUCKY RIVER COMMUNITY CARE, EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, PETITIONER

PROCEEDINGS

February 11, 1997 9:05 a.m.
Morning Session

HEARING OFFICER MORTON: On the record. Mr. Miller, would you like to call your next witness. And the witness today, will be over here, rather than over there.

MR. MILLER: We'd call Leonard Echols.

HEARING OFFICER MORTON: Mr. Echols. Raise your right hand.

WHEREUPON,

LEONARD ECHOLS,

A witness herein, after being first duly cautioned and sworn, was examined and testified as follows:

HEARING OFFICER MORTON: Okay, Go ahead, Mr. Miller.

DIRECT EXAMINATION

BY MR. MILLER:

Q. Can you hear me all right?

A. Uh-huh.

Q. What is your name?

A. Leonard Echols.

Q. Mr. Echols, where are you employed?

A. Caney Creek Rehabilitation Complex.

Q. Where is that?

A. It's in Pippa Passes, Kentucky.

Q. What position do you hold there?

A. I'm the Administrator.

Q. And, as Administrator, what are your responsibilities?

A. To monitor and direct the operation of that facility, as far as the utilization of the budget re-

sources, the staffing, training, interface with the community and other agencies.

Q. Could you tell us, briefly, what that facility's function is?

A. It's an 80-bed psychiatric rehabilitation program that houses chronically mentally ill adults, primarily from the State Psychiatric System, where people have history of or histories of being in State Psychiatric Hospitals.

It provides a method of treatment based on psychiatric rehabilitation, which is out of Boston University, which helps people develop skills and whatever they need to be able to move ahead with their life, to possibly move into the community, become independent or semi-independent.

Uh—often dealing with the fact that they have been institutionalized for long periods of time and simply either have not learned the skills initially or have lost those skills because of no need to use them.

So, it's an activity-based program, where individual plans are developed with each resident to try to determine what it is that they want to accomplish, and then how to go about accomplishing that.

And then there are different experiential opportunities set up between the educational groups, life skills groups, to help them attain whatever that goal is.

Q. Okay. Thank you. How many employees work at this facility?

A. I believe there are 110 at this point.

Q. Now you mentioned, a minute ago, treatment plans for the residents. First of all, how many residents do you currently have?

A. Seventy-five.

* * * * *

Q. And then how the—how the—you relate to the unit coordinators and rehab counselors and so forth?

A. There is—the administrative position, the one that I hold. There's also an assistant administrator for operations that is responsible for such things as overseeing maintenance and housekeeping and the clerical staff.

On the clinical side, or the treatment side, there is a clinical coordinator position which is currently vacant, and then two unit coordinators that are the team leaders for two units, one half of the building each.

On each unit–by the way, the building is divided into four equal 20-bed units. They're all identically made up. Each unit has five rehab counselors and ten rehab assistants. There's also additional nursing staff, the six RN's and LPN's that provide medical service and deal with providing medications, since

most of—all of our residents are on sometimes very complicated medications.

* * * * *

Q. Now, in addition to orientation does the treatment plan have any other elements or parts?

A. Well, again, depending on the individual need of the resident, it may have including anything from participation in specific groups, for example, if you have a person that you are—who has decided that they want to live independently, and that's an appropriate goal for them, you would get them involved in things like anything from money management to medication, understanding their medication, eventually to be self-medicated.

To be able to go out and shop. To handle, just sort of the day-to-day routines that most of us take for granted, but they have not had much experience with.

With other people, again, it may be just helping them develop what we call their general life skills or their daily life—uh, their ADL's is what it's called, that's basically their life skills, how to get up, get going, get dressed, attend meetings or—or be at breakfast on time, that sort of thing.

So the range of that, of what the plan may be, again, is quite wide. And it's related to the ability of that particular resident to what their functioning level is and also what their goal is.

We've had situations of people that came in, we thought would be rather limited, and it's turned out they've—they have managed to move ahead quite far. We have had other people that are really clearly fairly restricted in how far they'll go. And so the rehabilitation of that person is primarily to help them get the most out of the program.

They probably will stay there indefinitely, as opposed to other people who have moved out and into the community successfully.

Q. So you have residents who have a quite wide range in degrees—

A. That's correct.

Q. —of ability to function?

A. That's correct.

Q. Now, these other aspects of the treatment plan, who is responsible for developing those?

A. Those are all part of—I mean the—the groups are developed as part of the overall program. And an individual resident will not be in all groups. In other words that might not meet their needs.

So the plan determines which groups or which activities they should—they should participate in.

Q. And if—

A. It's kind of a menu approach to—to that.

Q. And who's responsible for developing the treatment plan?

A. The rehab counselor.

Q. Does that—is that plan in writing?

A. Yes. There's a format that's set up that's very similar to the medical records that you would find in most—in any residential or hospital setting. And those are regulated as to what needs to be included in those plans, as far as demographic information as well as goals and objectives.

Q. Does the plan have to be modified at all during the course of the resident's stay?

A. There are—there are—first of all, there has to be reviewed at least every 30 days. But in addition to that, they do—they do a weekly summary that essentially reviews whether there's been any progress or changes in what's going on with that particular resident.

Those summaries should relate back to the actual goals in the treatment plan. Uh—if there's been anything unusual or unique, that's occurred during the week, that will be, of course, entered into the record, at the point that that occurs.

But they are required to do weekly summaries, and then a monthly.

Q. Is the treatment plan and these summaries and weekly updates are they in writing?

A. Yes.

Q. Who prepares those?

A. The counselor. Other people may participate, by the way, in the summary, other—other members of the treatment team may participate, because there are observations made by nursing or assistants or even you could have information from people in the kitchen or—or maintenance, if they've had some interaction. So any of that information can be included. It may come from other staff.

* * * * *

Q. Do they—do they have—who do the rehab counselors report to, if anybody?

A. The unit coordinator.

* * * * *

Q. In sharing of this information, if there's some decision that has to be made about what to do with respect to a resident, who would make—who would be responsible for making that decision?

A. The modification of the treatment plan is the counselors responsibility. And that—and that again is signed off on by the unit coordinator.

* * * * *

Q. Since you've touched on it now, can you describe the duties of the rehab assistants, what they do?

A. Well I think they're—they're pretty much like the traditional direct care staff in any kind of residential or inpatient. They provide, as I've—the two terms, I think, are support and supervision, that they're the—they're the largest part of the manpower that's there.

And they do most of the—the real basic kinds of work, and make sure the people get up in the morning, get to where they need to be going, to make sure they are where they're supposed to be.

You pretty much live and die on the basis of structure and schedules, because we're responsible for these people. We need to make sure that they're not either wandering around or that they're not spending a lot of time not participating in the program.

* * * * *

Q. By the way, once the case treatment plan is prepared, where is that filed?

A. It's in medical records. There's a record on each resident. That includes all of the required information—uh, and those are at the work stations.

Q. Those are at the work stations?

A. There's a work station between each of the two units. So there's—there's a work station for each side of the building. And the medical records are kept there.

* * * * *

Q. If a rehab assistant has some question about what to do about—with respect to a particular resident, you know, what would he or she do to find out what to do?

A. Well it would depend on what the—what the level of the question was. It might be they'd just ask the counselor or the unit coordinator. And sometimes they can just ask each other if they're just not clear about how something has been—has been communicated.

* * * * *

Q. If a rehabilitation assistant did something that was serious and the question of discipline came up, such as a written warning or something more serious, how would that process work?

A. Well usually the—whatever the incident was, would be documented on the unusual incident report. And then that comes up to me, would be shared with the unit coordinator, whatever form of investigation or substantiation needs to be done would be carried out.

And if, in fact, it required an action, that would be carried out generally by the supervisor, which—which in this case the unit coordinator would actually carry out.

Q. Okay. Now if this—if it was a situation which the rehabilitation counselor was first made aware of,

would the counselor have any responsibilities concerning communicating that incident to yourself or the unit coordinator?

A. Whoever is aware of the incident is required to document, that's standard for all staff, so it would make no difference what level.

* * * * *

Q. Who does the performance evaluations for the rehabilitation assistants?

A. The unit coordinator.

* * * * *

Q. Could you describe for us the role at the facility of the registered nurses? First, I guess I should ask you, how many registered nurses do you currently have?

A. We're required to have six, by contract, so that there is one on each shift, and that's specific to our contract. That—that exceeds the regulations, as far as our license. And, in part, that's because of our location of being not adjacent to any medical facility, it's a guarantee of safety for the residents.

* * * * *

Q. Actually I guess I need to go back and ask you something related to the rehab counselors and assistants about the shifts.

What shift do the rehab counselors work?

A. Primarily first. There's a float rehab counselor on the second that's there for most of that shift.

Q. And what about the rehabilitation assistants?

A. They're distributed over all three shifts, with the smallest number obviously on third shift.

* * * * *

Q. Okay. Now, switching back to the nurses, how many shifts do you have?

A. Three.

Q. Is that 24 hour a day?

A. That's correct, seven days a week.

Q. How are the nurses assigned to the shift?

A. They're—there are—the reason we have six is that allows you two per shift, so that—so that they're, by overlapping the two schedules for seven days you'll have one on shift, or one on each shift, each day, so you have the RN's, a minimum of three RN's in the building, per day, one on each shift.

Q. What are the responsibilities of the nurse assigned to each shift?

A. Well the primary responsibility is that they are the—kind of the senior medical person in the building

all the time. We have medical services provided by both doctors and psychiatrists, but they're only in the building a limited time.

So, they are responsible for any kind of medical services, such as medication, physical health, ensuring that people are—if there are problems with—uh, they even work with—uh, can work with the dietitian if there are special diets for some of our people, might be running special tests on people because of the imbalance in their diet or there's a medication issue.

So again they're the primary medical provider for most of the shift. For second, third, and weekend shift, they're also designated as the building supervisor. And that means that they are responsible for kind of overviewing the coverage in regard to first of all just basic safety, and then if there are special activities or needs in the building, by a particular resident, that they have that responsibility.

We tried to centralize that because it was impossible to do it with four different units, and not having someone coordinate building coverage. You need someone that really has—is looking at all the resources within the building, to see what's needed and when you may in fact need to call in additional staff because you're short-handed or you may have minimum coverage, but you may have a situation where you have a particular high unit, but they're just sort of up and possibly agitated and you want additional coverage.

Q. Do you have any other medical staff that the registered nurses supervise?

A. The LPN's who do a lot of the medica—the medication services. Most of our residents are on numerous medications, and they—more than we had ever anticipated when we set the program up.

And I think that was the reason that we needed to be sure that we had adequate nursing coverage was because of the—the complexity of that medication.

Q. What are the nurses, registered nurses responsibilities with respect to the LPN's?

A. Uh—to ensure that they are—that the medications are passed at the right time to the right people. And that all—if there's any documentation that's required in any events, that it's carried out properly. But the nurse—the RN's have the primary responsibility.

* * * * *

Q. You mentioned that on second and third shifts, and on the weekends, the RN's are the building supervisor?

A. That's correct.

Q. Okay. What responsibilities do they have in that position?

A. Primarily to ensure that there's adequate coverage to carry out and maintain safety in the building, carry out the activities.

Q. Do they have any responsibilities for scheduling staff, that is creating work schedules?

A. Not prior to that. Theirs is more of a response to when we become short-handed, if they need to call in additional staff to ensure that we have adequate coverage.

Q. Do they have—do they have the authority to call in additional staff if—

A. Yes.

Q. —somebody doesn't show up for work?

A. Yes.

Q. So they could call, if I understand you—well, do they—do they have the authority to call somebody and say, "We need you, report to work"?

A. The—the way the system is set up, is we attempt to get voluntary people, maybe someone who will stay over from an existing shift.

Uh—I believe this last weekend we had some people come in early and some people stay late, so that there was nobody—maybe no one who worked actually a full extra shift.

We try to use as many least intrusive ways of setting this up as possible. But they can then go throughout and call people to come in.

I don't think we've actually had a point where we've had to order people. We've generally been able to find people who volunteer or are willing to stay over.

Q. Have there been instances, that you know of, where the nurse in charge of the building had to call somebody at home to ask them to come in?

A. Oh, yes.

Q. Okay.

A. We have a particular situation, when we have bad weather, because of the location, and we have developed a list of local people, in the immediate area who were—were willing to—to come in, so that we are able to call folks who could get there.

Because, if you are outside the immediate area you sometimes can't get in over the mountains.

Q. What other authority does the building supervisor have with respect to the employees?

A. That—that is their primary responsibility.

Q. Suppose that an employee became insubordinate or unruly, or say, you know, showed up for work intoxicated, would the nurse have any responsibility to correct that situation?

A. She would—uh, be required to report that immediately to probably that person's supervisor, and determine what the best action is to take, whether the person be asked to leave the building at that point.

During second shift, first and second shift, on weekends and during second shift, you have at least one counselor in the building as well. So they're—they would be involved if it was their unit, for example.

So, again, you have that other level of staff involved if an incident occurred.

Q. As the building supervisor, what—how is the authority allocated between her or him, if you have a male nurse, I don't know if you do, and an employee's immediate supervisor, whoever that may be?

A. As far as the coverage issues?

Q. Well as far as the kind of disciplinary issue I just mentioned?

A. Well, again, anybody that's—that's aware of that situation would report it. Uh—it would then effect coverage, probably, so the RN would become involved as to whether that person had to leave and whether that would require additional personnel replacement.

Q. As between the building supervisor and the employee's immediate supervisor, who would have the ultimate authority to determine what to do about that employee, in the situations I've posed for you?

A. The building supervisor would be making the judgment, because they would be best able to tell whether the person was intoxicated, for example, if that was the issue.

Q. How frequently do the six RN's have the building supervisor responsibility?

A. By description of that authority, it's second and third shift. It's essentially any time that there's not senior staff or administration in the building.

So even though second shift—uh, generally there will be a unit coordinator or myself or someone in the building, they may—they—you know, we may check on that.

But it is—it is the latter part of second shift, third shift and the weekends.

* * * * *

Q. And my question is, how frequently would any one individual nurse be assigned to the second or third shift or * * * weekend shift—

A. I don't—I don't have figures on how often it happens. But anytime it drops below the—the minimum coverage, they're authorized to—to get the extra coverage.

* * * * *

HEARING OFFICER MORTON: So you got a nurse—two nurses who work only first shift?

THE WITNESS: Right.

HEARING OFFICER MORTON: Okay. And so they are never building supervisors?

THE WITNESS: On weekends they are.

* * * * *

HEARING OFFICER MORTON: Okay. And then but the third shift are always building supervisors?

THE WITNESS: Right.

* * * * *

CROSS-EXAMINATION

BY MR. SCHULZ:

Q. Let's stay with the nurses first. Who decides how many employees are necessary to cover a shift?

A. There's a minimum coverage amount that was set—uh, I think probably a year ago.

Q. And who set that?

A. Uh—it was done with the clinical coordinator and the two unit coordinators.

Q. And so these building supervisors, they wouldn't be responsible for saying that that staffing level is insufficient?

A. It's—well they would determine from—I mean the numbers are already there. So they, by counting the number of bodies in the building they can determine whether or not it's—

Q. Right. But could they—could they decide that that staffing level that was set was inadequate and that they need two—

A. For situational issues—

Q. —additional employees?

A. —sure.

Q. And how would they go about doing that, then?

A. Then they would—they would call the person on call and ask for additional approval.

Q. In what circumstances? Maybe I'm getting confused here. Could they increase the staffing level that's being authorized by the unit coordinator on a permanent basis?

A. Not—No. I mean that would be a change in policy. I mean they would have—They would have to have input and go through a procedure to do that, yes.

But they can situationally ask for an increase. For example, if we have a problem where we need special supervision of a —of a resident.

Q. How often does that happen?

A. Does not happen frequently. It's been—

* * * * *

Q. All right. You talked about the hypothetical of the intoxicated employee showing up. And you said that the building supervisor would use the judgment to determine whether or not that person was intoxicated.

Who would decide whether or not that person should be discharged?

A. Discharged?

Q. Discharged?

A. You mean fired?

Q. Fired?

A. That would go through normal personnel action. The—the building supervisor, or anyone else who observed that, would document—

Q. And report?

A. — what they had seen, and would report it, and it would go up through the same personnel policy—or I mean the disciplinary action that you'd have for anybody else.

Q. But could the nursing building supervisor—

A. Discharge directly?

Q. —discharge directly and say—

A. No.

Q. Or send them home and say "You're suspended," or "You're docked in pay," or anything like that?

A. They—they could send them home if they're not—and then they would—they would call and inform the unit coordinator or their supervisor. If it was a maintenance person it might be the maintenance supervisor, for example.

Q. Okay.

HEARING OFFICER MORTON: Has that ever happened?

MR. SCHULZ: Well that was my next question.

HEARING OFFICER MORTON: Okay. All right. Go ahead.

CROSS-EXAMINATION (CONT'D)

BY MR. SCHULZ:

Q. How often has this ever occurred?

A. No, not to my knowledge.

HEARING OFFICER MORTON: Well, wait a minute.

THE WITNESS: It's not—

HEARING OFFICER MORTON: I can't hear you. I'm sorry.

THE WITNESS:—an occurrence. It's not an occurrence.

HEARING OFFICER MORTON: Never? Are you saying not too much or no?

THE WITNESS: Not to my knowledge has it—

HEARING OFFICER MORTON: Not to your knowledge?

THE WITNESS: Yes.

* * * * *

CROSS-EXAMINATION (CONT'D)

BY MR. SCHULZ:

Q. Okay. We talked about, as I understand it, really what you're gonna run into is situations on weekends and second and third shift, potentially, where they don't have enough people there, for whatever reason, and especially in bad weather?

A. Right.

Q. And that was the problem being addressed by setting up these building supervisor concept?

A. That you needed someone who had ultimate responsibility, to have the authority—to act.

Q. Yeah, to make the head count and to make the telephone calls?

A. That's correct.

* * * * *

Q. Is there a roster that they would check, with phone numbers on it?

A. There's a—there's a schedule. Yeah, they have all the phone numbers. But there's a schedule in each unit that tells who's on each day. So they could check and see if in fact someone's scheduled.

And then sometimes maybe they only have to have them come in early a few hours, just to overlap so that, you know, whatever's necessary can be carried out.

Q. Now, as I understand these—we'll just go through them real quick. These building supervisors, do they hire anybody?

A. No.

Q. Do they transfer anybody?

A. You mean on a permanent basis?

Q. Yeah? Transfer somebody saying, you should be in a different job classification?

A. No. No. The only transfers they would have is if they were moving people from one unit to another to ensure coverage.

Q. To ensure coverage?

A. Right.

Q. To make sure the head count is there?

A. That's correct.

* * * * *

Q. —on any particular shift? How are the LPN's assigned to their job slots? How do they—

A. The nursing coordinator schedules them in on —so that we have adequate coverage. But the—the number was not determined by contract like the RN's.

Q. Okay. How many LPN's do you currently have?

A. Three.

Q. And does the nursing coordinator also coordinate the shifts of the RN's?

A. Yes.

Q. And what do the LPN's do differently that what the RN's do?

A. Well the—the idea of having the LPN's was to have them primarily pass the medications, because that—it is time consuming, and not a good use of the RN time.

Uh—in the—in the original contract, I don't think, again, people had appreciated how complicated that

was. So we made sure we had LPN's available to do that.

Q. Now who do the LPN's directly report to?

A. The nursing coordinator.

Q. The nursing coordinator.

* * * * *

MR. MILLER: Was [Union Exhibit Number 1] something that was reviewed and approved by you or anyone else in upper management before—

THE WITNESS: I was aware that this had been handed out, yes. As I said, it was attached, at that time—

MR. MILLER: No objection.

THE WITNESS: —to the minimum coverage numbers.

HEARING OFFICER MORTON: The exhibit's received.

(Whereupon Union's Exhibit Number 1 was

received in evidence)

CROSS-EXAMINATION (CONT'D)

BY MR. SCHULZ:

* * * * *

Q. —and if they were involved in activity that perhaps wasn't appropriate that they could be subject to an unusual incident report by whoever observed whatever activity they may have been engaged in?

A. That's correct.

* * * * *

Q. —who would ultimately decide whether or not that report or information you're getting is accurate? Who would do the –

A. The ultimate decider?

Q. Yeah?

A. It would be the—it would be the unit coordinator, because they're the supervisor of the whole team.

* * * * *

Q. And you also testified, I believe, the RN's at times will run—

A. Some special—

Q. —groups?

A. —groups that have medical basis, generally.

Q. To their expertise?

A. That's correct.

* * * * *

Q. Okay. Identify the people that would be involved in reviewing these plans?

A. It would be nursing staff, could be the assistants, could be the unit coordinator.

* * * * *

HEARING OFFICER MOTION: On the record.

EXAMINATION

BY HEARING OFFICER MORTON:

* * * * *

A. I take it back, we did assign RN's specifically to units, so that they are more aware of those particular residents. I'm sorry.

* * * * *

Q. Okay. Are they—are the units divided up between the two RN's on each shift?

A. That's my understanding.

Q. Okay. So what—now what—what if—what if there's only one RN on a shift, does that person have responsibility for the two units—

A. Yes.

Q. —that aren't hers?

A. Yes. The primary part is that there—there's a medical component to the treatment plan that they need to be responsible for, and to assist in setting up that part of the plan, and particularly if it has to—uh, that's sort of an interface with the psychiatrist or the medical doctor, the nurse is the person who assists in making sure there's—again, we've had people on special diets, or who would have to watch their fluid intakes or whatever, it's the nurse that provides that information.

* * * * *

Q. Okay. Now, Alicia Cook is the nursing coordinator. Who does she report to?

A. To me.

Q. Okay. And where is she in the structure with respect to the clinical coordinator?

A. That was a joint position previously. It's now—we established a new position for the nursing super—nursing coordinator. There still is a clinical coordinator position.

Q. Okay. But are they—are they kind of equal—are they peers?

A. Essentially.

Q. All right. And what are—what are Ms. Cook's duties, briefly?

A. I'm sorry?

Q. What are her duties, briefly?

A. Supervising nursing and all medical services. She also helps coordinate our—uh, the psychiatric and medical services. She works with our medical doctor, and is capable of carrying out some of those medical activities as well.

Q. And what job classifications, that we've been talking about here today, does she supervise?

A. The RN's and LPN's.

Q. Okay. And does she—does she hire them?

A. Yes.

Q. With—and is she the person who schedules them?

A. Yes.

* * * * *

Q. Is this grievance procedure that you talked about written anywhere?

A. Yes.

Q. Okay. If I were a counselor and I wanted to initiate the first step, who, according to the policy, who would I go to?

A. The counselor for—

Q. I'm a counselor.

A. For your own grievance?

Q. Right.

A. I mean this is what you are grieving?

Q. Correct.

A. It would go—it would go to your supervisor. It would be a written—

Q. And who would that be?

A. Your unit coordinator.

* * * * *

Q. Okay. So I want to talk a little bit about the RN's. What are the hours for first shift?

A. Three—or, excuse me, 7 to 3:30.

Q. Second shift?

A. 3 to 11:30.

Q. Okay. And then third shift?

A. 11 to 7:30.

* * * * *

Q. Okay. One of the reasons I asked this is I know, I think in response to Mr. Miller's question, you were talking about when this—these building supervisor duties begin. And you were saying later in the second shift.

So about what time in the second shift would the nurse—would these other people be gone and the nurse would become the building supervisor?

A. As generally would be somewhere probably around five or six o'clock, that's—that when most of your senior staff would be out of the building.

* * * * *

Q. * * * I mean how does she know when she actually takes over those duties, during her shift?

A. Well, unless you've got a unit coordinator, if there's anything to do with coverage issues, it—it would probably go to her anyway, because that's the person you would ask.

In other words, if I'm in the building, I would, you know, be surprised if they came up to me and said, "Looks like we're gonna be a little short on night shift, what do you think we should do," in other words, that question is going to be asked of the building supervisor.

Q. Okay.

A. Though often times they don't know that for sure until later in the shift, because call-ins sometimes don't occur until maybe an hour or two. So I mean they may not even know that there's an issue that they need to deal with until later in the shift.

Q. Okay. What if—what if there are two RN's on this shift, what's the—what's the Employer's policy about which of them acts as the building supervisor?

A. There has not been a formal policy.

Q. Do you know how that actually works?

A. Just one sort of assumes the responsibility, they'll—

Q. I mean, do you know?

A. No.

* * * * *

Q. Okay. In addition to the memo here, and I understand that there's another memo, is there a job description like the other job descriptions that we've seen here today for this job building supervisor?

A. No, there is not.

Q. Okay. Do they get extra pay?

A. No.

* * * * *

Q. Okay. Do you know—do you know of any instance where they have ever required someone to come in, under threat of discipline for instance?

A. I don't know. But I don't know that it's not happened either.

* * * * *

Q. I mean does the nurse have the authority to do that, say if you don't come in you're gonna get three days off or you're gonna get a written warning or—

A. No.

Q. No. Okay. Maybe someone—maybe someone asked you this, but are you aware of any incident where a building supervisor has ever had to send someone home?

A. I don't—no.

* * * * *

Q. Quickly, on Alicia Cook, as I understand, and I think I heard you correctly, she hires the RN's?

A. Alicia Cook is responsible for that, yes.

Q. And she's also responsible if there has to be a termination, to fire, she's responsible?

A. Yes.

Q. Okay.

A. I mean she's—she is like a department head—

* * * * *

Q. Okay. Let me see, just a couple more. You mentioned somebody being on-call, who is on-call?

A. A member of senior staff is on-call.

Q. Is that a designated individual?

A. Yes, there's a schedule put out on a monthly basis.

Q. Okay.

HEARING OFFICER MORTON: And who is the senior staff? Who are you talking about?

THE WITNESS: Senior staff are those individuals, are the department heads or the unit coordinators, in other words—uh, the people that you went through the exempt list, primarily Peggy Mason, myself, the two unit coordinators, Alicia Cook, Eddie Jacobs, Deb Beverly—

HEARING OFFICER MORTON: Okay. Thanks.

THE WITNESS:—Nathan Fugate. I think I got everybody.

* * * * *

HEARING OFFICER MORTON: Mr. Miller, do you want to call your next witness.

MR. MILLER: Call Alicia Cook, please.

HEARING OFFICER MORTON: Raise your right hand.

WHEREUPON,

ALICIA COOK

A witness herein, after being first duly cautioned and sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. MILLER:

Q. What is your name?

A. Alicia Cook.

Q. Where are you employed?

A. At Caney Creek Rehabilitation Complex.

Q. What position do you hold there?

A. Presently, nursing coordinator.

* * * * *

Q. Okay. Can you tell us who the current nurse is or nurses who are assigned to third shift?

A. We have Sherri Cook, she's an RN; and we have an LPN, Danny Blair. We have a float—uh, between second and third shift, an RN, Toni Hall, she is on third at least four days of the—of the week, four to five.

Q. Who is that?

A. Toni Hall.

Q. Okay. And on the days she's not on third shift does she work at all?

A. She's on second shift.

* * * * *

Q. Now do either Ms. Anderson or Ms. Noble have any building supervisor responsiblities?

A. When they're the RN for that shift, they're responsible for those duties.

Q. Okay. Are there times when both Ms. Anderson and Ms. Noble are there on second shift or is it just—

A. Yes.

Q. —either one or the other?

A. There are times that both of them are there.

Q. Okay. When they're both there, who has the responsibility as building supervisor?

A. Though there's not a formal—uh, responsibility as far as which one is responsible, it tends to be the one who is the most senior. Uh—Toni Hall and Karen Noble came the middle of December. And so they're new employees.

* * * * *

Q. Are there occasions when they [Carlene Hogs, Betsy Smith, and Sondra Robinson] have building supervisor duties?

A. On the weekends they would, and on the rare occasion that they might cover another shift, but—

Q. How frequently do those three nurses work weekends?

A. On the day shift, for first shift?

Q. Yes?

A. Every other weekend.

Q. Is that normally just one day or both days of the weekend?

A. Both days.

* * * * *

Q. Have you seen that [Union Exhibit 1] before?

* * * * *

A. I know that there had been a list of responsibility circulated to the nurses. I heard it verbalized but I had not seen the document.

* * * * *

Q. Are you aware of any instance when a nurse who is the shift—I'm sorry, the building supervisor, had to call anybody to get them to come in or to cover a slot, has that come up since you've been in the position?

A. Not since I've taken the position, no.

* * * * *

CROSS-EXAMINATION

BY MR. SCHULZ:

Q. On the staffing, are there always two RN's present at the facility?

A. On the third shift there is not always two RN's present.

Q. Every other time?

A. Uh—yes, on the other shifts.

Q. On third shift, when there is not always two present, how often does that happen?

A. Two RN's or two nurses?

Q. Either way?

A. Because we have an LPN on that shift as well.

Q. Right.

A. Uh—one to two times a week—uh, given that there is holiday season or—uh, that it's a time that a lot of residents are gonna be out of the building.

HEARING OFFICER MORTON: There's just one RN, is that what you're saying, one or two times a week there's just one RN on third shift?

THE WITNESS: Uh—occasionally one, one time a week.

* * * * *

HEARING OFFICER MORTON: Do you have another witness, Mr. Miller?

MR. MILLER: Mark Stone.

WHEREUPON,

MARK STONE

A witness herein, after being first duly cautioned and sworn, was examined and testified as follows:

HEARING OFFICER MORTON: Okay. Have a seat. Speak into the microphone. Go ahead, Mr. Miller.

DIRECT EXAMINATION

BY MR. MILLER:

Q. What's your name?

A. Mark Stone.

Q. Where are you employed?

A. CCRC.

Q. That's Caney Creek?

A. Caney Creek Rehabilitation Complex.

Q. What position do you hold there?

A. Unit coordinator.

Q. For which unit?

A. A and B.

Q. Who do you supervise?

A. I supervise direct care staff, which is the 20 RA's and 10 rehab counselors.

Q. And what do you mean by RA?

A. RA is short for rehab assistant.

* * * * *

Q. Okay. Mr. Echols testified earlier, I believe you were here when he testified, about the summaries that the rehab counselors prepare?

A. Yes.

Q Now, what's in those summaries?

A. Summaries is to determine where they're at, as far as progress made towards goals in their treatment plan. I mean the facility is treatment plan directed.

So if the treatment plan—uh, tell somebody they have hygiene problems or whatever, then, you know, the responsibilities of the assistants and—the responsibilities of the counselor is to make sure the assistants carry this stuff out.

* * * * *

MR. SCHULZ: Yes. I'd like to call Alice Anderson.

WHEREUPON

ALICE ANDERSON,

A witness herein, after having been first duly cautioned and sworn, was examined and testified as follows:

HEARING OFFICER MORTON: Okay. Have a seat there. And like I'm telling everybody, just kind of talk into the mike there. Go ahead, Mr. Schulz.

MR. SCHULZ: All right.

DIRECT EXAMINATION

BY MR. SCHULZ:

Q. Please state your name for the record.

A. Alice Anderson.

Q. And by whom are you employed?

A. Caney Creek Rehabilitation Complex.

Q. And for how long?

A. A little over 19 months.

Q. And in what capacity?

A. Registered nurse.

* * * * *

Q. So when you're working there, on second shift, where does your responsibility range?

A. I always have another nurse with me.

Q. Okay.

A. It's either an RN or and LPN. And we—she takes half the building and I take half the building.

Q. Is it always the same or will it vary?

A. It will be either an LPN or an RN who—

Q. Okay. But will you take the same half of the building?

A. Sometimes we rotate so we can keep up with the residents.

Q. Okay. And who decides on that?

A. Oh, we just say, "You want this side," or, you know, it's just up to us.

Q. Okay. It's just mutual agreement on that?

A. Uh-huh.

* * * * *

Q. Okay. I'm going to show you, I think was called Union Exhibit 1, on the RN Building Supervisor duties. I was going to ask you to look at that document. Do you know what that document is?

A. This was a memo that was put in our memo book. And we had to read it and sign off on it.

Q. All right. Memo book, what's a memo book?

A. We have a memo book with all the memos that come out. And every person in the building is required to read them and to initial a page with their name on it, that they have read this.

Q. Okay. And you saw that—this particular memo?

A. Yes.

Q. Now there was some testimony, just a few minutes ago, about—I think it's—the number escapes me.

HEARING OFFICER MORTON: Well here, let's get them.

Q. Employer's Exhibits 13 and 14. I'd like you to take a moment or two just to look those over. And then let me know when you've finished looking them over.

(Pause)

A. I remember Carol talking to us about these, but I don't recall seeing them, but—

Q. Okay.

A. —they could have been in the book and I just overlooked them.

Q. Okay. You don't remember them?

A. No.

Q. All right.

A. But I know we did talk about that.

* * * * *

HEARING OFFICER MORTON: No. Well, let me ask you this, is there anything in there, listed in those memos, that you don't do?

THE WITNESS: I don't check the staffing pattern and I don't visit the unit to check coverage.

HEARING OFFICER MORTON: And then go—look it over and see—

THE WITNESS: I'm not in charge of rehabilitation staff. I was never told I was in charge of them.

* * * * *

DIRECT EXAMINATION (CONT'D)

BY MR. SCHULZ:

Q. Who advised you on what your responsibilities of building supervisor was to be?

A. No one. I just read the memo.

Q. You just read the memo. How do you know when you are building supervisor?

A. Of the evening, like when the administration leaves, is that what you're asking?

Q. Well, yes?

A. We usually go up there and look out in the parking lot and see if their cars are gone, and then we know they're gone and—

Q. Nobody comes and tells you—

A. No.

Q. —you're now in charge?

A. No.

Q. All right. Between the two of you that are always on that shift, is there one of you all that decides to be building supervisor or do you both fulfill that function?

A. We both say we're building supervisors.

Q. All right.

* * * * *

Q. Okay. Do you have any relationship with the LPN's?

A. We work together as a team.

* * * * *

Q. So—Okay. I think I've got it. No let's jump back over to this building supervisory. As I understand it from earlier testimony, there was some talk about making calls or asking people to stay over. Can you tell me how that's worked in your practical experience?

A. We usually do not have to call someone from home to come in. But there have been occasions that we've asked people to stay, and they didn't want to.

And so if I thought I was gonna have to call somebody, I would ask Mark or Fred that used to work with us, and before I even ask somebody to stay over a couple hours I call them.

Q. Okay. You call them, and you would be calling them where?

A. Or whoever is on-call. At home.

* * * * *

Q. Okay. Now just briefly—and as briefly as you can, describe what your job duties are, in your position, that you hold?

A. When I come on, it's time for me to start the medications. And so I pass the medications at 1700 and 2100. And it takes over two hours to do the 2100 meds. I do physical assessments. We have eight residents assigned to us. They're all from different units.

I have to do their physical assessments. I take care of any complaints they have, such as stomach ache or maybe a cut or shaving cuts, just whatever they have, I—that's what I take care of. If it's something I can't handle, I call the doctor.

* * * * *

Q. Anything else you do?

A. Uh—if they go on a home visit, they are supposed to come and tell us when they leave or when they return to the facility. It happens sometimes that they don't do that, and we don't even know they're back.

* * * * *

Q. Okay. And do you have any responsibility for making calls?

A. If we don't have enough coverage, I would call the on-call person, and tell them. And then we would see who could possibly come in.

* * * * *

CROSS EXAMINATION

BY MR. MILLER:

* * * * *

A. We had a problem where the—the aides and the counselors were making the calls to the doctor. And only a registered nurse can take a doctor's order over the phone. And we had discussed that.

And she had stated that she was going to have to put out a memo so that they would know not to call the doctor theirself. Dr. Dinady, our psychiatrist, was getting calls from everybody. And he only wants to talk to the nurse.

Q. Okay. When you're working on second shift, as the building supervisor, are you the senior person there?

A. Yes.

* * * * *

A. We were told—I had been there 19 months. We've had three different supervisors. Our first supervisor, and it's never been changed, had told us, "RN's and LPN's are the same at Caney Creek."

* * * * *

Q. And so the LPN should do what you direct to her to do?

A. In some cases. Now she may have more expertise in some area, she has worked in a nursing home, that she might know more, and I would yield to her.

Q. But if there's a disagreement between the two of you about what ought to be done—

A. I would call my supervisor.

Q. Who is your supervisor?

A. Alicia Cook.

* * * * *

THE WITNESS: No. Uh—we don't go to each unit when we come on duty, to check and see if every-

thing's okay. And the only time we know anything about the staffing pattern is if someone calls in they have to come through nursing, or one of the RA's or counselors will come over and say, "We're short," somebody's left, they got sick, that's—that's when we know that we're short.

Q. When you're short, the—it's reported to you?

A. Yes.

* * * * *

Q. You've never had to call anybody to come in?

* * * * *

A. It has never arisen. We've called—I've called them to ask if I can keep someone over, but never to call someone in from home.

* * * * *

EXAMINATION

BY HEARING OFFICER MORTON:

* * * * *

Q. Okay. So, there was some discussion here today, earlier, about authority to discipline people or send them home or—have you ever had to do that?

A. No.

Q. As the building supervisor?

A. No.

Q. Okay. Have you ever had to call either someone on-call or one of the other supervisors, with an employee problem?

A. No.

* * * * *

DIRECT EXAMINATION

BY MR. SCHULZ:

Q. Please state your name, for the record.

A. Ben Martin.

Q. And by whom are you employed?

A. CCRC.

Q. And that's Caney Creek?

A. Right.

* * * * *

Q. But I just want your best recollection of how long you've been there?

A. Approximately almost—I think in April it will be two years.

Q. Okay. And in what capacity are you employed there?

A. Explain.

Q. What's your job title?

A. RA.

Q. The rehab—

A. Assistant.

Q. Okay. Rehab assistant.

A. Uh-huh.

* * * * *

Q. Do you have any relationship, in your job duties, with the RN's or the LPN's?

A. Yeah.

Q. And what would—tell me how you all interact?

A. If we have a resident—once again, I work second, and the counselors are gone. And if we have a resident really acting out I will go to the nurse or the RN's and say, this is what's going on, and we communicate that way. And we—we got together and we'll say well—they'll say, what do you think, and I'll say well—you know, it's kind of like back and forth.

And then they usually—uh, either medication or something like that.

Q. Okay. So any other way you interact with the RN's?

A. I'm friends with all of them.

Q. I understand. But not—not on a social basis, but on a business basis? I don't mean—your job duties, that you would have occasion, you said when you have a—

A. Yeah, because if one of them is feeling bad, I mean you'll actually see a resident, you know, just slouching around, I'll actually go the nurse, you know, bring that up to them.

Or, if you see a resident, you know, they'll actually come up to you—they'll come up to me before they will anybody else, and they'll say "My stomach's hurting, I'm not really feeling well," I will actually go, you know, to the nurses, and pull them, and say, do something for it.

Q. Okay. So you communicate to them—

A. Right.

Q. —the medical conditions—

A. Right.

Q. —that you think would need to be taken care of?

A. Uh-huh.

Q. Any other ways you interact with those people?

A. We help them get them up for meds, when the medication comes around.

Q. Okay.

A. We get them all out and bring them up.

Q. So when the nurse needs—

A. Right.

Q. —some assistance you do—

A. We do that.

Q. —that?

A. Uh-huh.

Q. Any other way that—I mean, you know, that you can think of, that's kind of a regular part of your job that you're gonna have to interact with them?

A. Besides medications, I guess what we call PRN's, we actually go in with the nurses when they do that.

Q. What is that?

A. It's sort of like if a resident is really acting out, like a medication to—to, you know, bring them back, to stabilize them.

HEARING OFFICER MORTON: That stands for "As needed"?

THE WITNESS: Yeah.

HEARING OFFICER MORTON: Yeah.

THE WITNESS: We actually go in and make sure everything goes fine with that.

MR. SCHULZ: Okay.

DIRECT EXAMINATION (CONT'D)

BY MR. SCHULZ:

Q. Provide some assistance—

A. Assistance—

Q. —security, whatever—

A. —yes.

Q —you want to call it?

A. Right. Security and assistance.

* * * * *

Q. Okay. Oh, who's your immediate supervisor?

A. Mark Stone, Treatment Coordinator.

* * * * *

PROCEDURE: For Building Supervision

RATIONALE: To facilitate Caney Creek Rehabilitation Complex's operation during the time when Administration is not available in the facility

During the time that Administration is not available within the facility, a nurse will be designated building supervisor. This includes evenings, nights, weekends, holidays, and weather emergency situations. He/she will be in charge of the facility and all rehabilitation staff. All concerns of the building, staff, staffing, and residents will be first directed to the nurse in responsible for quality resident care. He/she will take call-offs, ensure adequate staffing, and be ultimately responsible for quality patient care. Staff will be responsible and accountable to the building supervisor. He/she will assume leadership in emergency situations. He/she, or his/her designee, will make all telephone calls, including those to administration. This establishes a chain of command and will eliminate unnecessary and duplicate phone calls.

[Emp. Exh. 13]

MEMORANDUM

DATE: August 23, 199€

TO: All Nurses

FROM: Carol Sincaglia

SUBJECT: Building Supervision

Mr. Echols and I discussed that you as building supervisors are not being utilized enough. We will have this issue on the agenda again at Monday's Senior Staff meeting. In the meantime when you come on duty, please check the staffing pattern and visit the units to check the coverage. If necessary, pull from one unit to another. Please write up anyone who does not comply with the request immediately. This will give you more visibility in this role.

[Emp. Exh. 14]

R/N-BUILDING SUPERVISOR
DUTIES

In absence of the Administrator, Assistant, or Treatment Coordinators, the R/N on duty will assume the responsibility of Building Supervisor. In the event of an emergency the R/N-Building Supervisor will follow the procedures identified in the emergency plan.

In the event of Inclement Weather (Snow, Flood) and employees are unable to drive to work the R/N-Building Supervisor will call local employees first (A list of employees attached with local employees highlighted), all calls will be made from CCRC. R/N-Building Supervisor will have the authority to ask employees to stay over until they have a replacement or there are 5 employees per wing plus a security guard.

Every effort will be taken to relieve the R/N-Building Supervisor and employees in the earliest possible time frame fitting the emergency situation.

The R/N-Building Supervisor is not relieved of his/her duties until an Administrative person, Administrator, Assistant Administrator, or Treatment Coordinator, is in the Complex.

[Union Exh. 1]

REQUEST FOR PROPOSAL
Cabinet for Human Resources

Eighty (80) Bed Personal Care Home
For Adults with
Severe Mental Illness

Knott County, Kentucky

Prepared by:
Department for Mental Health and Mental
Retardation Services
May, 1994

[Jt. Exh. 4]

* * * * *

SECTION 30
SCOPE OF WORK AND PROGRAM REQUIREMENTS

30.000 Purpose

It is the purpose of this RFP to obtain the contract service of a single entity to accomplish the following:

A. Operate and manage an eighty (80) bed personal care home in Knott County, Kentucky for persons with severe mental illness;

B. Provide psychiatric treatment and therapeutic rehabilitation interventions that are appropriate for adults with severe mental illness;

C. Provide directly or through community resources, opportunities for residents to gain and/or improve basic living skills;

D. Maintain the quality of care and services in accordance with 902 KAR 20:036 personal care home operation and services, and in a manner acceptable to the Cabinet for Human Resources as defined in this RFP.

30.100 Mission and Programmatic Design

The eighty (80) bed personal care home is established with the mission of providing an environ-

ment for the rehabilitation and support for persons with severe mental illness. The majority of the individuals will be referred directly from the state psychiatric hospitals, others with an extensive history of psychiatric hospitalization may be accepted for admission from the community upon the review and approval of the interagency, screening committee. The personal care home is designed to provide rehabilitation and treatment in a residential setting for individuals who require a structured and supervised environment. Mental health treatment and rehabilitative programming will be designed to assist residents in managing their mental illness and in acquiring basic living skills.

Residents of the personal care home should be assisted in retaining the fullest possible control over their own lives and be empowered to make choices concerning the services and activities in which they will be involved. The services available should be culturally appropriate and based on a psychosocial rehabilitation model where staff work with residents, individually and in small groups to assist them in acquiring or strengthening skills. Examples of skills residents may need include: (1) meal preparation; (2) housekeeping; (3) laundry; (4) basic reading, writing and math; (5) use of public transportation; (6) money management; (7) social skills; (8) self-management, and others as determined by the resident's goals and functional assessment. Recreational activities, both in the facility and in the community, should be integrated in the daily and weekly routine offered to residents.

The facility should be staffed by capable, qualified, culturally sensitive individuals who demonstrate knowledge of and commitment to the concept of psychosocial rehabilitation. The atmosphere and attitude should be one of staff support, resident empowerment, respect and positive regard for the individual. The focus of all actions will be to protect and balance the rights of the residents and to provide an environment that maximizes opportunities for acceptance. Services will be provided in accordance with the principles of normalization.

30.200 Description of Target Population

The facility shall serve those individuals eligible for receiving personal care home services as specified in 902 KAR 20:036 and who meet the following criteria:

Adult men or women who have been discharged or are awaiting discharge from a state psychiatric hospital, can be referred to the personal care home.

The individuals who will be considered for admission may have experienced failed placements, (community or alternate care facility), multiple inpatient psychiatric admissions and/or long tenure in a state psychiatric hospital. While not all of the individuals referred will have a history of the following behaviors, the personal care home is designed for persons whose behaviors are challenging to treat and require a more intense level of individualized intervention. In a study of the

reasons why individuals return to state psychiatric hospitals, the following behaviors and conditions were noted as contributing to unsuccessful placements:

- socially inappropriate behaviors (physical acting out towards others; sexually inappropriate behavior; setting fires; etc.)
- wandering or running away from previous living situations;
- a lack of assistance with resource management;
- a history of depression which may include suicidal attempts;
- substance abuse and mental illness;
- poor use of leisure time;
- unwillingness or inability to seek treatment/rehabilitation services for psychiatric problems which result in uncontrolled psychotic behavior;
- poor personal hygiene to the extent that interferes with contact with others.

30.250 Screening and Admission Process

Individuals will be screened by a committee, including representatives of the Department for Social Services, the Community Mental Health Centers, the state funded psychiatric hospitals, the vendor organization and a consumer. The Division of Mental Health will serve as an ad hoc, non-voting representative. For individuals, referred to the facility, the admission criteria shall be im-

posed which considers those who are in most need of services. A draft copy of more detailed admission criteria is attached. (See attachment B.) Any exceptions to the use of this process would have to be approved by the Commissioner of the Department for Mental Health and Mental Retardation Services.

If an individual is referred to a state psychiatric hospital for the 80 Bed Personal Care Home and is discharged within two weeks, he/she shall be allowed to be directly re-admitted to the personal care home.

30.300 Bio-Psychosocial Assessment, Functional Assessment, Treatment/Rehabilitation Planning, Documentation and Discharge/ Aftercare Planning Requirements

The vendor shall comply with the following Bio-Psychosocial Assessment, Functional Assessment, Treatment/Rehabilitation Planning, Documentation and Discharge Planning Requirements:

Bio-Psychosocial Assessment

All services shall be provided as identified through an individualized bio-psychosocial assessment which is developed by the resident and clinical team of the personal care home. The personal care home shall initiate services beginning with a self-assessment by the individual which identifies his/her preferences, personal goals and needed services. The bio-psychosocial assessment shall be completed within 30 days of admission and shall cover each of the following areas:

— A physical examination within 14 days prior to admission for individauls who come directly from the state operated or contracting psychiatric hospital, a physical examination performed within 30 days of discharge from a state psychiatric hospital is acceptable;

— Information related to the following:

  — Home and community environment;
  — Religion;
  — Childhood history;
  — Military service history;
  — Financial status;
  — The social, peer group, and environmental setting from which the person comes;
  — The person's family circumstances, including the composition of the family group; the current living situation; and social, ethnic, cultural, emotional, and health factors, including drug and alcohol use.

— An assessment of emotional, and behavioral status and substance abuse use;

— A nutritional assessment, including special diets, eating disorders or any major weight changes;

— Based on the permission of the individual, a determination of need for the involvement of the family members or other individuals with

whom the resident has a significant relationship in the resident's treatment/rehabilitation;

— Information describing relevant past and current legal status;

— A mental status examination and current psychiatric evaluation; (A mental status examination and psychiatric evaluation performed within 30 days of discharge from the state hospital is acceptable.)

— An educational and vocational history;

— A history of medications and their side effects as experienced by the individual;

— An assessment of whether and physical and/or mental health problems are life threatening or may seriously affect the treatment or rehabilitation process.

Functional Assessment

A functional assessment shall consist of the identification of skills and skill deficits of the resident. (See attachment C functional assessment form to serve as as example of this requirement.) The following broad skill areas should be considered when developing a functional assessment:

- Time management;
- Health management;
- Social/recreational skills;

- Basic Living skills;
- Vocational/educational skills;
- Interpersonal relationship skills;
- Money management.

Each assessment shall be individualized for each resident.

Treatment/Rehabilitation Planning

Within 30 days of admission, a comprehensive treatment/rehabilitation plan shall be developed from the data contained in the psychosocial assessment and functional assessment. When indicated, a specific plan for involving the family or "significant others" with the permission of the resident, should also be included. At least annually, the individual shall receive the following: a physical examination; a dental examination; a psychiatric evaluation and updated functional assessment. The treatment/rehabilitation plan should also include:

- Language that is understandable to the resident's level of functioning;

- Goals related to the functional assessment, as well as crisis intervention/stabilization and clinical needs as determined in the psychosocial assessment (i.e., person's presenting problems, physical health, emotional status and behavior status);

- Objectives that are specific, measurable, observable, and time-limited;

- Staff who are assigned to work with the individual and frequency of treatment/rehabilitation interventions;

- The strengths of the individual;

- Evidence of involvement of the resident through each of the following:
  1. person's signature on the treatment/rehabilitation plan and;
  2. personal expression of rehabilitation goals, personal comments or suggestions for treatment/rehabilitation plan;

- Services outside the personal care home necessary to meet the resident's needs;

- Discharge criteria identified and agreed upon by persons listed on the treatment/rehabilitation plan.

Treatment/rehabilitation plan reviews and documentation of such shall occur under the following conditions:

- Every 3 months, and

- During major changes in the person's condition.

Progress Note-Documentation

The progress notes should clearly document the service delivery process. Charting should occur at least once weekly and at times when there is a significant change of behavior. The notes must contain the following:

- Dates(s) of service;

- Notation of services rendered and progress toward achievement of treatment/rehabilitation goals;

- Resident's reaction to treatment/rehabilitation interventions and need for continued treatment.

Information about the treatment/rehabilitation services provided by outside resources should also be included in the chart, if the individual agrees to the information being obtained and signs a release of information.

Discharge/Aftercare Plan

Upon discharge from the residential facility, an aftercare plan will be sent to the provider who will offer continued services. The aftercare plan will contain the following:

- Admission date

- Date of transfer

- Reason for transfer

- Condition at transfer

- Assessment
  1. Significant findings
  2. Progress
  3. Final assessment

- Recommendations
- Resident and family response
- Evaluation of current status

* * * * *

NOV 17 2000

No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SETH P. WAXMAN
Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LEONARD R. PAGE
General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status.

3. Whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees," rather than supervisors, and thus entitled to the rights and protections afforded by the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	11
Argument	14
I. The Board's interpretation of "independent judgment" is rational and consistent with the Act	14
A. The Board's interpretation is longstanding and widely applied	16
B. The Board's interpretation is consistent with the text of Section 2(11)	22
C. The Board's interpretation furthers Section 2(11)'s purpose	24
D. The Board's interpretation properly accommodates the Act's coverage of "professional employees"	32
E. The court of appeals erred in substituting its own interpretation of "independent judgment" for that of the Board	34
II. The Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and permissible under the Act	36
A. The Board's rule accords with principles of statutory construction and furthers the purpose behind the Act's exemption of supervisors	37
B. Practical considerations also support the Board's rule	39

Table of Contents—Continued: Page

III. The RNs working at Caney Creek are not supervisors 42
Conclusion 48

TABLE OF AUTHORITIES

Cases:

AFL v. *NLRB*, 308 U.S. 401 (1940) 40
Adco Elec. Inc., 307 N.L.R.B. 1113 (1992), enfoced, 6 F.3d 1110 (5th Cir. 1993) 22, 45
Ahrens Aircraft, Inc., 259 N.L.R.B. 839 (1981), enforced, 703 F.2d 23 (1st Cir. 1983) 37
Angelo C. Scavullo, 109 N.L.R.B. 1327 (1954) 19
Arlington Elec., Inc., 332 N.L.R.B. No. 74, 2000 WL 1614380 (Oct. 24, 2000) 17
Atlanta Coca-Cola Bottling Co., In re, 83 N.L.R.B. 187 (1948) 18
Atlanta Newspapers, 306 N.L.R.B. 751 (1992) 19
Auciello Iron Works, Inc. v. *NLRB*, 517 U.S. 781 (1996) 12, 16, 34
Barre-Nat'l, Inc., 316 N.L.R.B. 877 (1995) 40
Bethlehem-Sparrows Point Shipyard, Inc., 65 N.L.R.B. 284 (1946) 27
Beverly Cal. Corp. v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992) 36
Beverly Enters.-Mass., Inc. v. *NLRB*, 165 F.3d 960 (D.C. Cir. 1999) 41, 47
Boardman Co., 55 N.L.R.B. 105 (1944) 26
Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964) 40, 41
Bourne of Houston, Inc., 280 N.L.R.B. 1222 (1986) 37-38
Bunting Brass & Bronze Co., 58 N.L.R.B. 618 (1944), aff'd on further consideration, 63 N.L.R.B. 818 (1945) 26
Capital Transit Co., 114 N.L.R.B. 617 (1955) 17

Cases—Continued: Page

Caremore, Inc. v. *NLRB*, 129 F.3d 365 (6th Cir. 1997) 36
Chevron Shipping Co., 317 N.L.R.B. 379 (1995) 17
Chicago Metallic Corp., 273 N.L.R.B. 1677 (1985), enforced in relevant part, 794 F.2d 527 (9th Cir. 1986) 16-17
Commercial Movers, Inc., 240 N.L.R.B. 288 (1979) 38
Commonwealth Edison Co., 60 N.L.R.B. 1365 (1945) 27
Douglas Aircraft Co., 50 N.L.R.B. 784 (1943) 25
Duval Tex. Sulphur Co., 53 N.L.R.B. 1387 (1943) 26
Endicott Johnson Corp., 67 N.L.R.B. 1342 (1946) 27
Essex Wire Corp., 188 N.L.R.B. 397 (1971) 19
FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 13, 38
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 16, 34
Federal Shipbuilding & Drydock Co., 55 N.L.R.B. 1438 (1944) 26
General Chem. Co., 64 N.L.R.B. 357 (1945) 26-27
General Dynamics Corp., 213 N.L.R.B. 851 (1974) 20
Golden West Broadcasters-KTLA, 215 N.L.R.B. 760 (1974) 19, 20, 46
Grancare, Inc. v. *NLRB*, 137 F.3d 372 (6th Cir. 1998) 10, 36, 37, 39, 40
Graphics Typography, Inc., 217 N.L.R.B. 1047 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) 3, 11, 16, 18, 19
Health Care & Retirement Corp., 328 N.L.R.B. No. 156, 1999 WL 562096 (July 27, 1999) 19, 48
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996) 13, 38
Hydro Conduit Corp., 254 N.L.R.B. 433 (1981) 17, 38
Integrated Health Servs. v. *NLRB*, 191 F.3d 703 (6th Cir. 1999) 35, 36

Cases—Continued: Page

International Ctr. for Integrative Studies/The Door, 297 N.L.R.B. 601 (1990) 20
Javierre v. *Central Altagracia*, 217 U.S. 502 (1910) 38
John Cuneo of Okla., Inc., 238 N.L.R.B. 1438 (1978), enforced mem., 106 L.R.R.M. (BNA) 3077 (10th Cir.-1980) 18
Leedom v. *Kyne*, 358 U.S. 184 (1958) 32
Lockheed Aircraft Corp., 87 N.L.R.B. 40 (1949) 17
Magnesium Casting Co. v. *NLRB*, 401 U.S. 137 (1971) 41
Marine Eng'rs Beneficial Ass'n v. *Interlake S.S. Co.*, 370 U.S. 173 (1962) 34
Mid-America Care Found. v. *NLRB*, 148 F.3d 638 (6th Cir. 1998) 10, 36
Mississippi Power & Light Co., 328 N.L.R.B. No. 146, 1999 WL 551405 (July 26, 1999) 17
Mitchell v. *Kentucky Fin. Co.*, 359 U.S. 290 (1959) 38
NLRB v. *Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir. 1991) 41
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 24, 29, 31, 39
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 16, 34
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 34
NLRB v. *Harmon Indus., Inc.*, 565 F.2d 1047 (8th Cir. 1977) 45
NLRB v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1974) ..... *passim*
NLRB v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) 34
NLRB v. *Hilliard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999) 32
NLRB v. *Quincy Steel Casting Co.*, 200 F.2d 293 (1st Cir. 1952) 18

Cases—Continued: Page

NLRB v. *Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983) 33, 46
NLRB v. *Swift & Co.*, 292 F.2d 561 (1st Cir. 1961) 34
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) 13, 37, 42
NLRB v. *Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981) 17
NLRB v. *Yeshiva Univ.*, 444 U.S. 672 (1980) 33
National Broad. Co., 160 N.L.R.B. 1440 (1966) 20, 46
New Jersey Worsted Mills, 63 N.L.R.B. 455 (1945) 26
New York Univ. Med. Ctr. v. *NLRB*, 156 F.3d 405 (2d Cir. 1998) 41
Northern Mont. Health Care Ctr. v. *NLRB*, 324 N.L.R.B. 752 (1997), enforced in relevant part, 178 F.3d 1089 (9th Cir. 1999) 21
Nymed, Inc., 320 N.L.R.B. 806 (1996) 15, 21
Ohio Masonic Home, 295 N.L.R.B. 390 (1989) 40
Oil Workers Int'l Union v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1971), cert. denied, 404 U.S. 1039 (1972) 47
Packard Motor Car Co., 61 N.L.R.B. 4, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947) 24
Phillips Petroleum Co., 61 N.L.R.B. 806 (1945) 27
Pittsburgh Equitable Meter Co., 61 N.L.R.B. 880 (1945) 27
Pittsburgh Plate Glass Co. v. *NLRB*, 313 U.S. 146 (1941) 41
Providence Hosp., 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997) 3, 11, 15, 22, 33, 45
Raleigh v. *Illinois Dep't of Revenue*, 120 S. Ct. 1951 (2000) 38
Rest Haven Living Ctr., 322 N.L.R.B. 210 (1996) 21

Cases—Continued: Page

Richards Chem. Works, Inc., 65 N.L.R.B. 14 (1945) 27
Schnuck Markets, Inc. v. *NLRB*, 961 F.2d 700 (8th Cir. 1992) 41
Sears, Roebuck & Co., 292 N.L.R.B. 753 (1989) 22
Security Guard Serv., Inc. 154 N.L.R.B. 8 (1965), enforced, 384 F.2d 143 (5th Cir. 1967) 46, 47
Skidmore, Owings & Merrill, 192 N.L.R.B. 920 (1971) 20
Somerset Welding & Steel, Inc., 291 N.L.R.B. 913 (1988) 18
Southern Bleachery & Print Works, Inc., 115 N.L.R.B. 787 (1956), further decision, 118 N.L.R.B. 299 (1957), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959) 22, 47-48
Southern Paperboard Corp., 84 N.L.R.B. 822 (1949) 16
St. Alphonsus Hosp., 261 N.L.R.B. 620 (1982), enforced mem., 703 F.2d 577 (9th Cir. 1983) 2-3, 13, 36-37
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 38
Thayer Dairy Co., 233 N.L.R.B. 1383 (1977) 38
Unifirst Corp., 280 N.L.R.B. 75 (1986) 41
VIP Health Servs., Inc. v. *NLRB*, 164 F.3d 644 (D.C. Cir. 1999) 46
Victor Chem. Works, 52 N.L.R.B. 194 (1943) 25, 26
Washington Post Co., 254 N.L.R.B. 168 (1981) 20, 46
Westinghouse Elec. Corp. v. *NLRB*, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970) 17
Weyerhaeuser Timber Co., 85 N.L.R.B. 1170 (1949) 16
Whitney Blake Co., 66 N.L.R.B. 491 (1946) 27
William C. Meredith Co., 74 N.L.R.B. 1064 (1947) 46
Wilson & Co., 61 N.L.R.B. 105 (1945) 26

Statutes and regulations: Page

Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450 24
Labor Management Relations Act of 1947, ch. 120, § 2(11), 61 Stat. 138 27
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) 2, 38
§ 2(11), 29 U.S.C. 152(11) ..... *passim*
§ 2(12), 29 U.S.C. 152(12) 12, 32, 33
§ 2(12)(a)(ii), 29 U.S.C. 152(12)(a)(ii) 32
§ 7, 29 U.S.C. 157 9
§ 8(a)(1), 29 U.S.C. 158(a)(1) 9
§ 8(a)(5), 29 U.S.C. 158(a)(5) 9, 40
§ 9(c), 29 U.S.C. 159(c) 40
§ 9(c)(1), 29 U.S.C. 159(c)(1) 40
§ 10(f), 29 U.S.C. 160(f) 40
29 C.F.R.:
Section 101.20(c) 40
Section 102.67(f) 41

Miscellaneous:

Black's Law Dictionary (3d ed. 1933) 23
93 Cong. Rec. (1947):
p. 4677 31
p. 4678 30
pp. 4677-4678 31
p. 6442 31
Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943 (1944) 25
H.R. 3020, 80th Cong., 1st Sess. (1947) 29
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 31, 32, 33
S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1 (1947) 13, 28, 30, 31, 32-33, 40
Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1938 (1939) 25
Webster's New International Dictionary (2d ed. 1934) 23

In the Supreme Court of the United States

No. 99-1815

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 193 F.3d 444. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 26a-33a) are noted at 323 N.L.R.B. No. 209 (Table). The decisions of the Board in the underlying representation proceeding (Pet. App. 34a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-63a) was entered on January 27, 2000. A petition for rehearing was denied on March 23, 2000 (Pet. App. 64a-65a). The petition for a writ of certiorari was filed on May 12, 2000, and was granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT

1. To be a supervisor under Section 2(11) of the National Labor Relations Act, an employee must have authority, in the interest of the employer, to perform one of 12 specified supervisory functions, and the employee's exercise of that authority must not be "of a merely routine or clerical nature," but must require "the use of independent judgment." 29 U.S.C. 152(11). The principal issue in this case is the reasonableness of the interpretation that the National Labor Relations Board (NLRB or Board) has given the phrase "independent judgment." Also at issue is the reasonableness of the Board's rule that the party who alleges that an employee is a supervisor bears the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table).

In *NLRB* v. *Health Care & Retirement Corp. of America* (*HCR*), 511 U.S. 571, 574, 584 (1994), this Court held that the Board had mistakenly applied a special test of supervisory status for the health-care industry based on an incorrect interpretation of the phrase "in the interest of the employer." Following *HCR*, the Board decided to apply to nurses its "traditional analysis" for determining the supervisory status of employees. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997). Under that analysis, an employee does not exercise the "independent judgment" that triggers supervisory status under the Act when the employee exercises ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. See *id.* at 729. See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). In this case, applying that test, the Board concluded that the registered nurses (RNs) employed by respondent Kentucky River Community Care are not supervisors.

2. a. Respondent is a nonprofit organization that operates mental health facilities in Kentucky. This case involves the Caney Creek Rehabilitation Center, a transitional residential center for mentally ill individuals who are seeking to develop skills necessary for independent living. Respondent operates Caney Creek under contracts with the Commonwealth of Kentucky Department for Mental Health and Mental Retardation. The contracts, which incorporate by reference certain provisions of Kentucky law, set forth eligibility restrictions for residents, facility staffing requirements, and

other guidelines that govern the services provided by respondent. Pet. App. 2a, 5a, 37a-39a. Caney Creek is organized into two wings, each of which is divided into two units that each accommodates 20 residents. The facility operates 24 hours per day, seven days a week. *Id.* at 45a. Overall responsibility for the operation of Caney Creek is vested in an administrator and assistant administrator. Caney Creek also employs two unit coordinators, as well as a nursing coordinator. There is also a recreational counselor, a manager for housekeeping and maintenance, and a kitchen supervisor. *Ibid.* All of those individuals are stipulated to be Section 2(11) supervisors. *Id.* at 54a.

Caney Creek employs 20 rehabilitation counselors, 40 rehabilitation assistants, six RNs, and three licensed practical nurses (LPNs). Pet. App. 45a; J.A. 8, 15, 29. Each of the four treatment units is staffed with five rehabilitation counselors and ten rehabilitation assistants. Pet. App. 6a, 45a. The RNs and LPNs provide medical services to residents throughout the units. *Id.* at 45a, 50a. Two RNs and one LPN generally work on each of three shifts (7 a.m. to 3:30 p.m., 3 p.m. to 11:30 p.m., and 11 p.m. to 7:30 a.m.), although occasionally only one RN works on the third shift. *Id.* at 50a; J.A. 16, 35-36, 41-42, 43-44.

For each resident, Caney Creek establishes a treatment plan that contains rehabilitative goals and specifies activities designed to accomplish those goals. Pet. App. 46a. The treatment plan also has a medical component, because all residents receive some form of medication. The rehabilitation counselors and RNs participate in the formulation of the plans, but each resident's treatment plan must be approved by the unit coordinator and the resident's psychiatrist. *Id.* at 19a-20a, 46a; J.A. 12, 33. The RNs work with and occasionally direct less-skilled employees to deliver services in accordance with the employer-specified standards expressed in the treatment plans.[1]

The non-medical component of the treatment plans is implemented on a daily basis by the rehabilitation assistants. Each morning, the rehabilitation counselors meet with the rehabilitation assistants, who volunteer for particular tasks. Pet. App. 20a, 47a-48a. The rehabilitation assistants ensure that the residents wake up on time, are properly bathed and dressed, attend scheduled classes, and keep their doctors' appointments. *Id.* at 47a-48a; J.A. 13.

The medical component of the treatment plans is implemented on a daily basis by the RNs and LPNs. Pet. App. 17a, 45a, 46a; J.A. 17, 18, 33. The LPNs pass medications to the residents. The RNs ensure that the correct medication is passed to the correct resident at the correct time, handle any necessary documentation, and provide direct medical care to the residents. Pet. App. 17a, 50a; J.A. 17, 18, 29, 33, 52. The RNs also work with the rehabilitation assistants: the assistants bring the residents' health problems to the RNs' attention and assist the RNs in administering medication "if a resident is really acting out." J.A. 57-61.

During part of the second and all of the third shift, and on weekends, neither the administrator nor any other stipulated supervisor is physically present at

---

[1] The provision of services to residents at Caney Creek is "treatment plan directed." J.A. 46. The treatment plans are kept on file at the work stations between the units and are "very similar to the medical records that you would find in most—in any residential or hospital setting." J.A. 11, 13. The elements of the treatment plans must conform to the specifications set out in the contracts with Kentucky. See J.A. 70-75; J.A. 11 (treatment plans are "regulated as to what needs to be included in those plans").

Caney Creek. However, a stipulated supervisor is always "on call" at those times. When the stipulated supervisor is "on call" rather than on site, an RN on duty is designated by respondent as "building supervisor." Pet. App. 16a, 50a; J.A. 18, 36, 39. The same RN may be an ordinary nurse on one day of the week and the building supervisor on another day of the week. See J.A. 22-23, 42. Moreover, the RNs on the second shift are not notified as to when during the shift they assume their building-supervisor responsibilities. J.A. 50-51. When serving as building supervisor, an RN receives no extra compensation. Pet. App. 50a; J.A. 37.

As building supervisors, the RNs have some additional duties. Although there is no job description for the position, J.A. 37, according to a memorandum issued by respondent, the building supervisors are "in charge of the facility and all rehabilitation staff." J.A. 62. As a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." Pet. App. 51a. When the building supervisors "come on duty," they are "[to] visit the units to check the coverage," and, "[i]f necessary, pull from one unit to another." J.A. 63. However, the number of employees necessary to cover a given shift is set by management. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another for the particular shift simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27.

The building supervisors also handle staff shortages when employees telephone that they are unable to report for their scheduled shift. Pet. App. 16a, 51a; J.A. 62, 64. In those situations, the building supervisors first seek a volunteer from the preceding shift to stay over. If no one volunteers, the building supervisors,

using a list, attempt to reach by telephone an off-duty employee who lives nearby to come in to work. Pet. App. 51a; J.A. 19-20, 64. In no case, however, do the building supervisors have authority to compel the employee to work under threat of discipline. Pet. App. 16a, 51a; J.A. 38.

According to a memorandum issued by respondent, the building supervisors are authorized to "write up" an employee who does not "comply" with a decision "to shift staff between units." Pet. App. 16a; J.A. 63. Respondent also contends that they have authority to "send an employee home" in some circumstances. Pet. App. 17a; J.A. 20-21. The record contains no evidence as to the consequences if an employee were "writ[ten] up" as contemplated in the memorandum. Indeed, there is no evidence in the record that the building supervisors have ever actually exercised authority either to "write up" an employee or to send an employee home. Pet. App. 51a; J.A. 26-27, 38, 55-56.

b. In January 1997, the Kentucky State District Council of Carpenters (Union) filed a petition with the Board seeking to represent an appropriate bargaining unit of employees at Caney Creek. Respondent contended that the RNs and the rehabilitation counselors should be excluded from any bargaining unit as Section 2(11) supervisors.[2] After a hearing, the Board's Regional Director (RD) rejected that contention. Pet. App. 46a-53a. The RD explained that, after this Court's decision in *HCR*, "the Board determined to apply the

[2] Respondent also contended that it is exempt from the Board's jurisdiction as a "political subdivision" of the Commonwealth of Kentucky. Both the Board and the court of appeals rejected that contention, Pet. App. 8a-13a, 37a-44a, and respondent has not sought this Court's review of that determination.

same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Id.* at 52a. The RD also noted that *HCR* did not "alter[]" the Board's "well settled" rule that "the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status." *Ibid.*

Applying those principles, the RD concluded that respondent had "not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act." Pet. App. 53a. The RD found that "the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." *Id.* at 51a. He found that "the RNs, including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." *Id.* at 52a. Although respondent contended that "RNs can 'write up' employees," the RD found that "there is no evidence in the record that they have ever done so." *Id.* at 51a. In fact, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. *Ibid.* The RD further found that "[t]he 'building supervisors' do not have any authority * * * to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Ibid.* He concluded that "[t]he fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status." *Id.* at 53a. The RD also found that the rehabilitation counselors are not supervisors. *Id.* at 49a.

c. Respondent requested the Board's review of the RD's decision. Insofar as relevant here, the Board denied the request for review. Pet. App. 34a. On March 20, 1997, the Board conducted an election among the employees at Caney Creek, which the Union won. Accordingly, the Board certified the Union as the bargaining representative of the employees, including the RNs and the rehabilitation counselors. *Id.* at 28a-29a.

Respondent refused to bargain with the Union. Pet. App. 29a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 26a.[3] On summary judgment, the Board found that respondent had violated the Act and ordered respondent to bargain with the Union. *Id.* at 26a-33a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the Board's finding that the rehabilitation counselors are not supervisors under Section 2(11) of the Act but held, by a divided vote, that "the registered nurses [that respondent] employs are supervisors." Pet. App. 2a. The court therefore denied enforcement of the Board's order "insofar as it includes the registered nurses in the bargaining unit." *Ibid.*

---

[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the Act, 29 U.S.C. 157, among which is the right of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. 158(a)(1).

The court of appeals explained that its task in this case was to determine whether the RNs' responsibilities "call for the exercise of 'independent judgment' under section [2(11)]." Pet. App. 17a. The court stated:

> Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with "management."

Ibid.

The court of appeals observed that it "has repeatedly rejected this interpretation" of "independent judgment" and has instead "found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts." Pet. App. 17a (citing *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638 (6th Cir. 1998)). The court also faulted the Board for "ignor[ing] our repeated admonition that '[t]he [NLRB] has the burden of proving that employees are not supervisors.'" *Id.* at 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)).

Applying its own understanding of "independent judgment" and the burden of proof, the court of appeals reasoned that the Caney Creek RNs are supervisors because they "direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking

employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments." Pet. App. 18a-19a. The court concluded that those duties "involve independent judgment." *Ibid.*[4]

Judge Jones dissented in part. He agreed with the majority's holding that the rehabilitation counselors are not statutory supervisors. Pet. App. 22a. However, based on the reasoning of the Regional Director, he would have reached the same conclusion with respect to the RNs. *Id.* at 23a-25a.

SUMMARY OF ARGUMENT

I. The National Labor Relations Board has long held that an employee does not exercise "independent judgment" that triggers supervisory status under Section 2(11) of the National Labor Relations Act when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. See *Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996), enforced, 121 F.3d 548 (9th Cir. 1997). See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). That inter-

---

[4] The court of appeals upheld the Board's finding that the rehabilitation counselors are not supervisors. The court explained that the rehabilitation counselors' primary function of designing a patient treatment plan "does not, of itself, involve any supervisory authority." Pet. App. 21a. Moreover, the fact that the assistants "carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors." *Ibid.* Respondent has not sought review of that holding by this Court.

pretation, which the Board has applied to a variety of industries and employees, is entitled to deference because it is rational and consistent with the Act. See, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996).

The Board's interpretation is supported by the text of Section 2(11). The use of both the limiting phrase "not of a merely routine or clerical nature" and the adjective "independent," suggests that, in order to be considered a supervisor, an employee must exercise judgment beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources. The Board's interpretation also advances Section 2(11)'s purpose of excluding from the Act's coverage those employees who exercise true managerial power while preserving the Act's protections for employees with minor supervisory responsibilities. Moreover, the Board's view reflects Congress's intent to adopt the Board's practice under the Wagner Act of excluding from supervisory status employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards. Finally, the Board's interpretation of "independent judgment" harmonizes Section 2(11)'s exclusion of supervisors with Section 2(12)'s inclusion within the Act of "professional employees," who, by definition, exercise "discretion and judgment."

The court of appeals erred in concluding that this Court's decision in *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), precludes deference to the Board's interpretation. *HCR* rejected only the Board's now-abandoned test for determining the supervisory status of nurses, which was based on an interpretation of Section 2(11)'s phrase "in the interest

of the employer." *Id.* at 574, 576. The Court made clear that its decision cast no doubt on Board decisions interpreting other parts of Section 2(11). *Id.* at 583. Indeed, the Court expressly pointed out that the phrase "independent judgment" is "ambiguous" and that the Board is therefore entitled to "ample room" in applying it. *Id.* at 579.

II. The Board has also long held that the party who alleges that an employee is excluded from the coverage of the Act as a supervisor bears the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table). The court of appeals erred in rejecting that rule, which has been upheld by other courts of appeals, and is reasonable and permissible under the Act. See *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983).

The Board's rule, which it applies regardless of the industry involved or the party that is asserting the claim of supervisory status, is consistent with the general principle that the burden of proving entitlement to an exemption from a statutory provision rests on the one who claims the exemption's benefits. *E.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). The Board's rule also furthers Congress's intent that the Act's exclusion of supervisors should apply only to individuals who are "truly supervisory" and exercise "genuine management prerogatives." S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1, at 4, 19 (1947). See also *Holly Farms Corp.* v. *NLRB.*, 517 U.S. 392, 399 (1996). Finally, the court of appeals' rule, which puts the burden of proving lack of supervisory status on the Board, presents practical difficulties, because the question of supervisory status is often determined in representa-

tion proceedings, in which neither the Board nor its General Counsel has an advocacy role.

III. Applying its interpretation of "independent judgment" and its rule regarding allocation of the burden of proving supervisory status, the Board reasonably concluded that the RNs employed by respondent are not supervisors. Their limited direction of LPNs and rehabilitation assistants does not involve "independent judgment." Rather, it is based on their professional competence and role as the more experienced member of a team, and it is circumscribed by the requirements of the treatment plans specified by respondent. The RNs' responsibility to ensure coverage at staff levels set by respondent, by following procedures that leave little room for discretion, likewise is not supervisory. Finally, the RNs' service as the highest ranking employee on site during certain hours does not entail the exercise of any supervisory function specified in Section 2(11), and respondent failed to meet its burden of proving that the RNs have disciplinary authority over other employees.

ARGUMENT

I. THE BOARD'S INTERPRETATION OF "INDEPENDENT JUDGMENT" IS RATIONAL AND CONSISTENT WITH THE ACT

Under Section 2(11) of the National Labor Relations Act, an employee is a "supervisor" only if the employee has authority "in the interest of the employer" to perform one of 12 specified supervisory functions, and the employee's exercise of that authority is not "of a merely routine or clerical nature," but "requires the use of independent judgment." 29 U.S.C. 152(11). In *NRLB* v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), this Court considered the validity

of the Board's approach at that time to determining whether a nurse is a supervisor under Section 2(11). Under that approach, "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients," was not authority exercised "in the interest of the employer." *Id.* at 574, 576. The Court held that the Board's interpretation of "in the interest of the employer" was inconsistent with the ordinary meaning of that phrase and prior decisions of the Court, and improperly created a special test of supervisory status for the health-care industry. *Id.* at 574, 576-584. The Court explained, however, that "phrases in § 2(11) such as '*independent judgment*' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees." *Id.* at 579 (emphasis added). The Court did not rule on the proper interpretation of any statutory element other than "in the interest of the employer." *Id.* at 583.

The principal issue in this case is whether the Board's current approach to determining whether a nurse is a supervisor under Section 2(11) of the Act—which the Board developed after *HCR* and which turns on the statutory term "independent judgment," rather than the phrase "in the interest of the employer"—is reasonable. The Board developed its current approach in two cases in which it heard oral argument and considered the submissions of numerous amici. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997); *Nymed, Inc.*, 320 N.L.R.B. 806 (1996). After carefully examining the structure of the Act, the legislative history of Section 2(11), and the relevant case law, including *HCR*, the Board decided to apply to nurses its "traditional analysis for determining

the supervisory status of employees in other occupations." *Providence Hosp.*, 320 N.L.R.B. at 717.

Under the Board's traditional analysis, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards is not the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11). See *Providence Hosp.*, 320 N.L.R.B. at 729. See also, *e.g.*, *Graphics Typography, Inc.*, 217 N.L.R.B. 1047, 1053 (1975), enforced mem., 547 F.2d 1162 (3d Cir. 1976) (Table). The court of appeals in this case erred in rejecting that view, which is rational and consistent with the Act. See, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

A. The Board's Interpretation Is Longstanding And Widely Applied

The Board has long held that whether an employee is a supervisor depends on the degree of judgment or discretion exercised by the employee in the performance of any of the supervisory duties specified in Section 2(11). See, *e.g.*, *Weyerhaeuser Timber Co.*, 85 N.L.R.B. 1170, 1173 (1949) (employee does not exercise "such a degree of independent judgment or discretion in the performance of his duties as would warrant a finding that he is a supervisor within the meaning of Section 2(11)"); *Southern Paperboard Corp.*, 84 N.L.R.B. 822, 824 (1949) (same). "Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees." *Chicago Metallic Corp.*, 273 N.L.R.B. 1677, 1689 (1985), enforced in relevant part, 794 F.2d

527 (9th Cir. 1986). Rather, supervisory status hinges on "the significance of his judgment and directions." *Ibid.* (quoting *NLRB* v. *Wilson-Crissman Cadillac*, 659 F.2d 728, 729 (6th Cir. 1981)). See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 437 (1981) (employee did not exercise "independent judgment" because he did not exercise "any significant discretion" with respect to supervisory powers); *Capital Transit Co.*, 114 N.L.R.B. 617, 618-619 (1955) (employee not supervisor when "discretion accompanying the duties [is] so circumscribed by limitations * * * as to negate the use of independent judgment").

Applying that principle to a various employment contexts outside of the health care field, the Board has concluded that employees who, based on technical skill[5]

[5] See, *e.g.*, *Arlington Elec., Inc.*, 332 N.L.R.B. No. 74, 2000 WL 1614380, *2 (Oct. 24, 2000) (electrician did not exercise "independent judgment" where he "provided direction and guidance to other employees based on his experience and craft skill and pursuant to [a statutory supervisor's] project plans"); *Mississippi Power & Light Co.*, 328 N.L.R.B. No. 146, 1999 WL 551405, *14-15 (July 26, 1999) (distribution dispatchers whose "performance of their own job entails the exercise of special knowledge or expertise" did not exercise "independent judgment" in directing field employees pursuant to "complex schemata"); *Chevron Shipping Co.*, 317 N.L.R.B. 379, 381-382 (1995) (licensed ship officers not supervisors where "their authority to direct the work of the crew is based on their greater technical expertise and experience" and "their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations," which "delineate[] in great detail" the duties of both licensed and unlicensed crew members); *Lockheed Aircraft Corp.*, 87 N.L.R.B. 40, 41-42 (1949) (leadmen not supervisors where they "interpret" shop orders and blueprints for members of their work groups); see also *Westinghouse Elec. Corp.* v. *NLRB*, 424 F.2d 1151, 1156 (7th Cir.) (upholding Board's finding that directions given by field engineers to casual laborers in accordance with design plans not

or experience,[6] exercise limited discretion to direct other employees in accordance with employer-specified standards (as expressed in blue-prints, established work procedures, and the like) do not exercise the "independent judgment" that triggers supervisory status. For example, in *Graphics Typography, Inc.*, the Board decided that experienced employees in a lithography shop did not exercise "independent judgment contemplated by Section 2(11)." 217 N.L.R.B. at 1053. Although the employees used "judgment in advising less experienced employees how to deal with specific work problems or how best to do a job," that

supervisory where "such communications are necessary incidents of the application of [the field engineers'] technical know-how"), cert. denied, 400 U.S. 831 (1970).

[6] See, *e.g.*, *Somerset Welding & Steel, Inc.*, 291 N.L.R.B. 913, 914 (1988) (employees who have "responsibility to direct the work" "based on their higher level of skill and greater seniority" "do not exercise independent judgment" when they "mak[e] sure [assignments] are completed to predetermined specifications"); *John Cuneo of Okla., Inc.*, 238 N.L.R.B. 1438, 1439 (1978) (experienced employee in charge of sprinkler installation crew does not exercise "independent judgment" in directing employees where blueprints are "generally explicit" and applicable industry booklet "regulates significant aspects of sprinkler installation"), enforced mem., 106 L.R.R.M. (BNA) 3077 (10th Cir. 1980) (Table); *In re Atlanta Coca-Cola Bottling Co.*, 83 N.L.R.B. 187, 189 (1949) (direction by driver-salesmen of activities of helper is "routine in character" and "does not exceed that of a skilled craftsman with respect to a single helper working under his direction"); see also *NLRB* v. *Quincy Steel Casting Co.*, 200 F.2d 293, 295 (1st Cir. 1952) (upholding Board's finding that employee who "had charge of [hot metal] pouring operation, a task of coordination, telling a fellow molder when to start and when to stop pouring" was not a supervisor even though the job "requires the exercise of some judgment" because "any of the skilled molders in the room was competent to handle the job" and the "operation is more or less routine").

direction "involved a technical judgment based on skill and experience" and did not "extend[] in any significant manner beyond standardized operating procedures." *Ibid.*[7]

The Board has applied the same principle to professional employees in a variety of fields. For example, in *Golden West Broadcasters-KTLA*, 215 N.L.R.B. 760, 762 & n.4 (1974), the Board found that "directors" at remote television broadcasts were not supervisors. The Board explained that supervisory status "turns not only

[7] When, however, an employee is vested with significant discretion to direct other employees within only general confines set by the employer's instructions, the Board has found that the employee exercises "independent judgment" that triggers supervisory status. See, *e.g.*, *Atlanta Newspapers*, 306 N.L.R.B. 751, 756 (1992) (men-in-charge, who "oversee the operation of the press," found to be supervisors because, "[a]lthough they have a checklist of operations to perform," they have "significant authority over and responsibility for their crews with respect to the assignment of work to them and their direction in carrying out their tasks"); *Essex Wire Corp.*, 188 N.L.R.B. 397, 403 (1971) (employee who was given written instructions "as to which operations were to be performed and for how long" found to be a supervisor because he "could and did exercise discretion and judgment" in "switch[ing workers] between operations, decid[ing] whether he had too many for his needs, [and] transfer[ing] them to the night-shift foreman for reassignment"); *Angelo C. Scavullo*, 109 N.L.R.B. 1327, 1332 (1954) (employee who received "general guidance" from route sheets prepared by management found to be supervisor because "even with the route sheets to guide him he must still exercise considerable discretion and judgment in giving" directions to other employees). See also *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156, 1999 WL 562096, *2 (July 27, 1999) (nurses found to be supervisors because they "exercise independent judgment when disciplining [aides], for example, by determining what category to classify a given infraction of the Employer's rules and to take the appropriate action").

on whether [an employee has] the authority, in the interest of the employer, inter alia, responsibly to direct other employees, *but also on the nature and extent of that authority.*" *Id.* at 762 n.4 (emphasis added). Thus, "an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor." *Ibid.* "This is so," the Board explained, "even when the more senior or more expert employee exercises some independent discretion where, as here, such discretion is based upon special competence or upon specific articulated employer policies." *Ibid.*[8]

[8] See also *International Ctr. for Integrative Studies/The Door*, 297 N.L.R.B. 601, 602 & n.7 (1990) (doctor not supervisor because she at most "engaged in the routine direction of employees," and "the routine direction of employees based on a higher level of skill or experience is not evidence of supervisory status"); *Washington Post Co.*, 254 N.L.R.B. 168, 204 (1981) (night metro editor not supervisor where he exercised "limited discretion" in assigning stories to reporters consistent with "the [e]mployer's standards for preparing a quality newspaper"); *General Dynamics Corp.*, 213 N.L.R.B. 851, 858-859 (1974) (employees who "exercise a certain amount of discretion in assigning work" not supervisors because discretion is "within the parameters set by the utilization of systems engineering," "exercised in a professional sense," and "directly related to a professional responsibility for the quality of work performed on the projects to which they are assigned"); *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920, 921 (1971) (project manager and job captains at architecture firm who have "some discretion in assigning work and are professionally responsible for the quality of work performed on a project to which they are assigned" are not supervisors but "merely provide professional direction and coordination for other professional employees"); *National Broad. Co.*, 160 N.L.R.B. 1440, 1441-1442 (1966) (deskmen not supervisors because they exercise "only such judgment" and execute "only such tasks as appropriately fall within the scope of the newswriting craft or profession" and their assignment and direction is "but a part of the group or team effort required for the production of up-to-the-minute, professionally prepared news programs in keeping with the standards maintained by the Employer").

As we have noted, see pp. 15-16, *supra*, after *HCR*, the Board decided to apply the same principle to the health care industry. Thus, the Board has recognized that a nurse who articulates the meaning of an established health care routine to an aide—like a technician who gives directions on the basis of a reading of a wiring diagram or blueprint—may well exercise some degree of judgment. Without more, however, a nurse delegated such limited authority over other employees is not exercising the "independent judgment" that triggers supervisory status but is making only a routine professional or technical judgment and giving directions based on that judgment. See *Northern Mont. Health Care Ctr.*, 324 N.L.R.B. 752, 753 (1997) (demonstrating to an aide the proper way to perform a procedure is "the exercise of the [nurse's] greater skill and experience in helping a less skilled employee perform her job correctly"), enforced in relevant part, 178 F.3d 1089 (9th Cir. 1999); *Rest Haven Living Ctr.*, 322 N.L.R.B. 210, 211 (1996) (LPNs do not exercise independent judgment because directives to aides are "narrowly circumscribed" and involve "routine directions to lesser skilled employees consistent with established employer policies"); *Nymed*, 320 N.L.R.B. at 807, 810-812 & nn.9-11 ("narrowly circumscribed" assignment and direction of aides does not involve independent judgment when based on detailed individual health care plans).[9]

[9] In some decisions applying the principle discussed in the text above, the Board appears to suggest that the principle also reflects an interpretation of Section 2(11)'s "responsibly to direct" lan-

B. The Board's Interpretation Is Consistent With The Text Of Section 2(11)

The Board's understanding of independent judgment is supported by the text of Section 2(11). The statutory language makes clear that an employee may exercise supervisory authority that requires the use of some degree of judgment without being a supervisor. Under Section 2(11), an employee is not a supervisor merely because he has authority to assign, responsibly to direct, or to exercise one of the other listed supervisory

---

guage. See, *e.g.*, *Adco Elec. Inc.*, 307 N.L.R.B. 1113, 1120 (1992) ("Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition. * * * * '[I]t is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a worker with management.'") (citation omitted), enforced, 6 F.3d 1110 (5th Cir. 1993); *Sears, Roebuck & Co.*, 292 N.L.R.B. 753, 754-755 (1989) (employee who assigns work is not engaged in either "responsible direction" or "the exercise of independent judgment" because he is "merely an experienced employee who knows which employee can better operate certain equipment"); *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791, 792-793 (1956) (employee does not exercise "the authority responsibly to direct other employees which flows from management" where employer's instructions merely "codify the control * * * customarily exercised by any skilled craftsmen over their helpers and apprentices"), further decision, 118 N.L.R.B. 299 (1957), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959). This case, however, presents only the question of the proper interpretation of "independent judgment," not the question of the correct interpretation of "responsibly to direct." See Pet. App. 52a-53a (relying on "traditional analysis" of independent judgment as described in *Providence Hosp.*, 320 N.L.R.B. at 717); Pet. App. 17a-19a (rejecting Board's interpretation of "independent judgment"); Pet. i (seeking this Court's review of proper interpretation of "independent judgment").

functions with respect to other employees. An employee is a supervisor only if his exercise of that authority is both "not of a merely routine or clerical nature" and "requires the use of independent judgment." 29 U.S.C. 152(11).

If Congress had intended to class as a supervisor any employee who directs other employees in a non-ministerial way, it could simply have provided that supervisory action requires the exercise of "judgment." The statute's use instead of both the limiting phrase "not of a merely routine or clerical nature" and the adjective "independent" suggests that, in order to be considered a supervisor, an employee must exercise supervisory authority using judgment that entails a significant amount of discretion.

That suggestion is reinforced by the meaning of the terms "routine" and "independent." At the time that Section 2(11) was enacted, "routine" meant "[o]f the nature of routine; performed, or occurring, regularly." *Webster's New International Dictionary* 2176 (2d ed. 1934); see also *ibid.* (defining the noun "routine" to mean "[a] round, as of business, amusement, or occupation, daily or frequently pursued; esp., a regular or customary course of business or official duties" (def. 1)). A leading legal definition of "independent," on the other hand, was "not subject to control, restriction, modification or limitation from a given outside source." *Black's Law Dictionary* 950 (3d ed. 1933). See also *Webster's New International Dictionary* at 1262 (including, among the definitions of "independent," "[n]ot contingent or conditioned" (def. 1b) and "unconstrained" (def. 5)). Thus, the text of Section 2(11) suggests, consistent with the Board's view, that the "independent judgment" that triggers supervisory status is judgment beyond that involved in carrying out regular or custom-

ary activities and which is not controlled or significantly constrained by outside sources, such as employer-specified standards.

C. The Board's Interpretation Furthers Section 2(11)'s Purpose

The Board's interpretation of "independent judgment" not only comports with the language of Section 2(11) but also advances the purpose of that provision. As we explain below, the exclusion of supervisors from NLRA coverage was designed to ensure that management could rely on the undivided loyalty of its representatives, but Congress intended to preserve the Act's protections for those employees with minor supervisory responsibilities who do not exercise true managerial power. Indeed, in enacting Section 2(11), Congress essentially adopted the definition of supervisor that the Board had employed in administering the original NLRA, known as the Wagner Act. Under that definition, as under its current practice, the Board did not class as supervisors employees who, in addition to doing their own work, provided limited direction for others based on technical skills or employer-specified standards.

1. The Wagner Act gave "employee[s]" the right to organize and did not expressly exclude supervisors from its coverage. See Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450; *HCR*, 511 U.S. at 573. As a consequence, the Board wavered on the question whether supervisors could organize until it ultimately decided that they could in *Packard Motor Car Co.*, 61 N.L.R.B. 4, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947). See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 277 (1974). Early in its administration of the Wagner Act,

however, the Board determined that, whether or not supervisors could organize in their own bargaining units, they could not be included in units composed of ordinary employees. See *Third Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1938*, at 180 (1939).

The Board therefore adopted the following definition in order to identify supervisory employees:

> [E]mployees who supervise or direct the work of employees [in the bargaining unit], and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight.

Douglas Aircraft Co., 50 N.L.R.B. 784, 787 (1943). See *Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943*, at 57 & n.57 (1944) (describing *Douglas Aircraft* as setting forth "a general standard definition of supervisory employees").

Under that definition, the Board consistently found that employees were not supervisors merely because, in addition to doing their own work, they exercised technical judgment to direct the work of less-skilled coworkers. For example, in *Victor Chemical Works*, 52 N.L.R.B. 194, 199 (1943), the Board found that "key men" were not supervisors, even though they were "experienced employees" who spent part of their working time "instructing or directing one to six helpers, or less experienced workers" who had been "directed to rely on the judgment of key men in decisions relating to the treatment of the product in their machines." The Board concluded that "the relationship between key men and employees with

whom they work" was "the relation between a skilled worker and his helpers or between an instructor and an inexperienced employee, whom he may be teaching." *Ibid.*[10]

The Board also found that employees were not supervisors when they directed other employees pursuant to employer-specified instructions or standards. For example, in *Wilson & Co.*, 61 N.L.R.B. 105 (1945), the Board found that certain "steady-time checkers" were neither supervisors nor "part of management" where, in accordance with "loading slips made out by the foreman," they "direct[ed] the manner in which the cars are loaded" by employees known as "car loaders." *Id.* at 106-107. Similarly, in *General Chemical Co.*, 64

[10] See also, *e.g.*, *New Jersey Worsted Mills*, 63 N.L.R.B. 455, 457 (1945) (finding "group leaders" in a wool mill not supervisors but rather "experienced workers" who spent "part of their time checking and assisting fellow employees placed under their direction"); *Bunting Brass & Bronze Co.*, 58 N.L.R.B. 618, 619-620 (1944) (finding "set-up men" and "linemen" not supervisors where they directed the work of less-skilled machine operators and assured that the work was done correctly), aff'd on further consideration, 63 N.L.R.B. 818 (1945); *Federal Shipbuilding & Drydock Co.*, 55 N.L.R.B. 1438, 1439 (1944) (fact that "the chargemen direct and guide the work of the draftsmen and drafting room technicians in their sections, does not, of itself, elevate them to such supervisory rank as to warrant their exclusion from the unit"); *Boardman Co.*, 55 N.L.R.B. 105, 108 (1944) (finding employees who "work with and direct small crews" not supervisors where the directing employees' authority derived from "superior experience [that] enables them to guide others in the performance of their work"); *Duval Tex. Sulphur Co.*, 53 N.L.R.B. 1387, 1390-1391 (1943) (chief electrician, motor mechanic, plant engineers and drillers who "work with helpers, and perforce direct and guide the work of their helpers" are not supervisors but "occupy positions comparable to that of master mechanics or journeymen in their respective crafts").

N.L.R.B. 357 (1945), the Board found that skilled laboratory employees, who were "to see to it that optimum operating conditions prevail," were not supervisors on the ground that they also may "direct the work of the production employees"; rather, the laboratory employees were "technical experts of a type frequently included in bargaining units." *Id.* at 361-362.[11]

The Board's decisions also indicated that whether employees were excludable from bargaining units of rank-and-file employees depended upon whether their work was "of a routine nature, not involving the exercise of managerial discretion" (*Whitney Blake Co.*, 66 N.L.R.B. 491, 494 (1946)) or instead required "a high degree of independent judgment" (*Commonwealth Edison Co.*, 60 N.L.R.B. 1365, 1368-1369 (1945)). See also *Phillips Petroleum Co.*, 61 N.L.R.B. 806, 812 (1945) (supervisory employee exercised "a considerable degree of judgment and discretion in supervising the work of other employees").

2. Section 2(11) was added to the NLRA as part of the Labor Management Relations Act of 1947 or Taft-Hartley Act, ch. 120, § 2(11), 61 Stat. 138, in order to

[11] See also *Endicott Johnson Corp.*, 67 N.L.R.B. 1342, 1347 (1946) (employees who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work"); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 N.L.R.B. 284, 286 (1946) (employees in shipyard who "coordinate and expedite the outfitting work on the ships, consulting the various craft foremen in order to insure that the work will progress smoothly and rapidly"); *Richards Chem. Works, Inc.*, 65 N.L.R.B. 14, 16 (1945) (employees responsible for "see[ing] that the work is gotten out" under daily instructions issued by the production manager); *Pittsburgh Equitable Meter Co.*, 61 N.L.R.B. 880, 882 (1945) (group leaders who, working under the foremen's direction, "instruct and assign material to men who work under them in groups from 1 to 40").

reverse the *Packard* rule that supervisory employees had a protected right to organize. See *HCR*, 511 U.S. at 573; *Bell Aerospace*, 416 U.S. at 279. As explained by the Senate Committee on Labor and Public Welfare, which crafted the language that, with slight modification, became Section 2(11), Congress's purpose was to ensure an employer the undivided loyalty of its representatives, who, if they were afforded a protected right to join or form unions, might be subject to control by the same union as the employees they were supposed to be supervising on the employer's behalf. S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1, at 4-5 (1947).

At the same time, however, Congress wanted to assure that its definition of "supervisor" would not embrace individuals whom the Board had generally found to be employees under the Wagner Act, even though they exercised some supervisory authority. Thus, the Senate Committee explained:

> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. Rep. No. 105, *supra*, at 4.

To preserve its intended distinction between "minor supervisory employees" and persons vested with

"genuine management prerogatives," the Senate Committee defined "supervisor" as:

> [A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

H.R. 3020, 80th Cong., 1st Sess. Tit. I, § 2(11) (1947) (as passed by Senate) (*reprinted in Bell Aerospace*, 416 U.S. at 280 n.10).[12] That language signaled Congress's

---

[12] The Senate definition of "supervisor" prevailed over a different definition passed by the House, which would have categorized as supervisors a broader spectrum of employees, including leadmen and other minor supervisors. See *Bell Aerospace*, 416 U.S. at 283. The Senate definition was narrower in this respect because, unlike the House definition, the Senate definition applied the "independent judgment" limitation to the whole range of supervisory functions. The House bill defined "supervisor" to include, *inter alia*, "any individual * * * who has authority, in the interest of the employer * * * to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action." H.R. 3020, 80th Cong., 1st Sess. Tit. I, § 2(12)(A)(i) (1947) (as passed by House) (House Bill) (*reprinted in Bell Aerospace*, 416 U.S. at 279 n.9). That provision, unlike the Senate definition, did not contain an "independent judgment" limitation. Although another provision of the House definition contained an "independent judgment" limitation, that provision concerned only employees having specified authority in regard to fixing wages earned by other employees. House Bill § 2(12)(A)(ii) (*reprinted in* 416 U.S. at 279 n.9). Thus, Congress used the independent judgment requirement to impose the dis-

intent essentially to incorporate the approach used by the Board to determine supervisory status under the Wagner Act, because it was an amalgam of the Board's *Douglas Aircraft* test,[13] and the "routine in nature"/"independent judgment" principle articulated in other Board bargaining-unit decisions. See pp. 25-27, *supra*. Indeed, the Senate Committee underscored that, in fashioning its definition of supervisor, it "adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file." S. Rep. No. 105, *supra*, at 4.[14] On the Senate floor, Senator Taft, the sponsor of the Senate bill, reiterated that "[t]he definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years." 93 Cong. Rec. 4678 (1947).

The Senate Committee's definition of "supervisor" was altered only in one respect before enactment by Congress. On the Senate floor, Senator Flanders offered an amendment to add the phrase "or responsibly to direct them" immediately after the phrase "other

---

tinction that it intended to draw between minor supervisors and true representatives of management.

[13] The Senate Committee's definition listed several additional indicia of supervisory authority (such as authority to "transfer" and "recall") that were encompassed within *Douglas Aircraft*'s catch-all category of authority to "otherwise effect changes in the status" of other employees. See p. 25, *supra*.

[14] The Senate Committee report cited with approval the Board decisions discussed in note 11, *supra*, which illustrate the principle that the direction of other employees in conformity with the employer's instructions does not make the directing employee a supervisor, even if it requires him to use some judgment. S. Rep. No. 105, *supra*, at 4.

employees." See 93 Cong. Rec. 4677 (1947). Senator Flanders explained that the amendment brought within the supervisory category persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate Committee] report," who, although lacking authority to make "effective" changes in the status of subordinate employees, are vested with substantial "managerial duties." *Id.* at 4677-4678 (emphasis added). Senator Taft immediately accepted the Flanders amendment, which in his view made no significant change to the definition of supervisor drafted by the Senate Committee, and the amendment passed. See *id.* at 4678.[15]

The Board's interpretation of independent judgment furthers the purpose of Section 2(11), as described above, in two related ways: It gives effect to Congress's intent to preserve the protections of the Act for employees who have only "minor supervisory duties" while excluding from coverage those who exercise "genuine management prerogatives." S. Rep. No. 105, *supra*, at 4. And it comports with Congress's intent to

---

[15] The Senate's definition of supervisor was adopted by the House-Senate conference committee. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 4 (1947). The Conference Report explained that "[t]he Senate amendment confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank. The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment." *Id.* at 35. In reporting the conference committee's action to the Senate, Senator Taft likewise explained that "[t]he Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. * * * The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." 93 Cong. Rec. 6442 (1947). See generally *Bell Aerospace*, 416 U.S. at 282.

incorporate the definition of supervisor that the Board used in administering the Wagner Act, which excluded from supervisory status employees who provided limited direction for others based on technical skills or employer-specified standards.

D. The Board's Interpretation Properly Accommodates The Act's Coverage Of "Professional Employees"

The Board's interpretation of "independent judgment" also harmonizes Section 2(11)'s exclusion of supervisors with Section 2(12), which includes "professional employees" within the coverage of the Act. See *NLRB* v. *Hilliard Dev. Corp.*, 187 F.3d 133, 142-143 (1st Cir. 1999). Under the terms of Section 2(12), professional employees, by definition, engage in "the consistent exercise of discretion and judgment." 29 U.S.C. 152(12)(a)(ii). See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). The Act's simultaneous exclusion of supervisors and inclusion of professional employees indicates that there is a distinction between the exercise of "independent judgment" and the exercise of "discretion and judgment." By giving effect to that distinction, the Board's interpretation of "independent judgment" preserves the coverage of professional employees mandated by the Act.

When Congress provided coverage to professional employees, it was aware that professionals work with assistants. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947) (definition of "professional employee" covers "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants"). Congress therefore could not have intended that this fact would prevent the coverage of "professional groups such as * * * nurses" that Congress provided for in Section 2(12). S. Rep. No. 105,

supra, at 19. See also *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

Congress's intent to cover nurses and other professionals would be frustrated, however, if "the consistent exercise of discretion and judgment" under Section 2(12) also constitutes "the use of independent judgment" under Section 2(11), because many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work. In order to effectuate Congress's intention to cover professional employees, the Board's interpretation clarifies that the exercise of Section 2(11) "independent judgment" is not synonymous with the exercise of Section 2(12) "discretion and judgment." Rather, a professional does not exercise "independent judgment" to the extent that her judgment is "indistinguishable from the professional judgment exercised by all [professionals in the same field]." *Providence Hosp.*, 320 N.L.R.B. at 729-730.

The Board's interpretation is consistent with its traditional view, as described by this Court, that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672, 690 (1980). Rather, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Ibid.* Cf., *e.g.*, cases cited in note 8, *supra*. See also *HCR*, 511 U.S. at 583 (noting that, outside the health-care industry, the Board has drawn "a distinction between authority arising from professional knowledge and authority encompassing front-line management pre-

rogatives"). By interpreting "independent judgment" to reflect that distinction, the Board properly avoids reading Section 2(11) in a way that "would swallow up and displace almost the entirety of the professional-employee inclusion." *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 185 (1981).

E. The Court Of Appeals Erred In Substituting Its Own Interpretation Of "Independent Judgment" For That Of The Board

The Board's interpretation of "independent judgment," and its application of that interpretation to various "different categories of employees," *HCR*, 511 U.S. at 579, is a classic illustration of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). In fulfilling that function, the Board is entitled to "considerable deference." See *Curtin Matheson*, 494 U.S. at 786; see also *Marine Eng'rs Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 179 n.6 (1962) (Board has been afforded "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status) (quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). Because, as we have demonstrated, the Board's interpretation of "independent judgment" is "rational and consistent" with the Act, the Sixth Circuit erred in substituting its own view for the Board's. See *Auciello Iron Works*, 517 U.S. at 787-788; *Curtin Matheson*, 494 U.S. at 796; *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42.

As the Sixth Circuit has previously explained, its refusal to defer to the Board's interpretation is based in

significant part on its belief that the Board's interpretation of "independent judgment" replicates the same "false dichotomy" that this Court rejected in *HCR* between "acts taken in connection with patient care and acts taken in the interest of the employer." *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 711 (6th Cir. 1999) (quoting *HCR*, 511 U.S. at 577). The Sixth Circuit's view, however, is based on an incorrect reading of *HCR*.

As we have discussed at p. 15, *supra*, *HCR* rejected only the Board's "in the interest of the employer" test for determining the supervisory status of nurses. 511 U.S. at 574, 576. The Court made quite clear the limited reach of its holding: "our decision casts no doubt on Board or court decisions interpreting parts of § 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Indeed, the Court pointed out that the statutory phrase "independent judgment" is "ambiguous" and, therefore, that the Board is entitled to "ample room" in applying it. *Id.* at 579. The Court also recognized (without any indication of disapproval) that, in various industries, the Board has applied "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives" in deciding whether employees exercise "independent" judgment. *Id.* at 583.

The Court in *HCR* did not hold that the Board is foreclosed from fashioning an interpretation of Section 2(11) that effectuates the statutory policy of ensuring coverage for "minor supervisory employees," such as leadmen, and for professional employees. Rather, the Court held only that the Board's "in the interest of the employer" test was an invalid means of effectuating that policy, because it was inconsistent with "the ordinary meaning of the phrase 'in the interest of the

employer'" and with the Court's precedents. 511 U.S. at 578. Because, as we have shown, the Board's interpretation of "independent judgment" is entirely consistent with the statutory text[16] and precedent,[17] the court of appeals erred in rejecting the Board's interpretation.

II. THE BOARD'S RULE REGARDING THE ALLOCATION OF THE BURDEN OF PROVING SUPERVISORY STATUS IS REASONABLE AND PERMISSIBLE UNDER THE ACT

This case also involves the question whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982),

[16] The court of appeals has repeatedly stated that "[i]t is perfectly obvious that the kind of judgment exercised by registered nurses in directing . . . nurse's aides in the care of patients * * * is not 'merely routine.'" *Integrated Health Servs.*, 191 F.3d at 711 (quoting *Beverly Cal. Corp.* v. *NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992)). Accord *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638, 641 (6th Cir. 1998); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 376 (6th Cir. 1998); *Caremore, Inc.* v. *NLRB*, 129 F.3d 365, 370 (6th Cir. 1997). That conclusion neither follows from the plain meaning of "routine" nor takes account of the statute's use of the additional "ambiguous" term "independent judgment." See p. 23, *supra*; *HCR*, 511 U.S. at 579.

[17] In *HCR*, the Court found the Board's reliance on the phrase "in the interest of the employer" to be inconsistent with the Court's reasoning in the *Packard* decision, in a respect that Congress did not change when it altered the *Packard* rule. 511 U.S. at 578. As we have shown, see pp. 27-31, *supra*, in reacting to *Packard*, Congress also did not disturb, but instead endorsed, the Board's established practice of affording the Act's protections to leadmen and other minor supervisors.

enforced mem., 703 F.2d 577 (9th Cir. 1983) (Table). The court of appeals rejected the Board's rule and held instead that the Board "has the burden of proving that employees are not supervisors." Pet. App. 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)). Because the Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and permissible under the Act, the court of appeals should have deferred to it. See *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983) (upholding Board's allocation of burden of proof in another context).

A. The Board's Rule Accords With Principles Of Statutory Construction And Furthers The Purpose Behind The Act's Exemption Of Supervisors

The text of the Act does not in terms supply a rule that allocates the burden of proving supervisory status. In that circumstance, the Board has discretion to formulate an allocation rule, and the rule is entitled to judicial deference if it is reasonable and permissible under the Act. See *Transportation Mgmt. Corp.*, 462 U.S. at 403. Exercising its discretion, the Board has developed a rule that applies regardless whether the employer, the union, or the Board's General Counsel is the party asserting a claim of supervisory status. Under the Board's rule, for example, an employer must carry the burden when it defends against an unfair labor practice complaint by claiming that the employee against whom it allegedly discriminated is a supervisor. See, *e.g.*, *Ahrens Aircraft, Inc.*, 259 N.L.R.B. 839, 842 (1981), enforced, 703 F.2d 23 (1st Cir. 1983). Likewise, a union must carry the burden when it challenges a ballot by claiming that the voter who cast the ballot is a supervisor. See, *e.g.*, *Bowne of Houston, Inc.*, 280

N.L.R.B. 1222, 1223 (1986). And the General Counsel must carry the burden when he alleges an individual's supervisory status as part of his case. See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 441 (1981). Furthermore, the Board applies the same rule to all industries subject to its jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977).

The Board's rule is reasonable and permissible under the Act. The text of the Act broadly defines "employee" to mean "any employee," but excepts from that coverage "any individual employed as a supervisor." 29 U.S.C. 152(3). See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984). As this Court has explained, "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (citing *Javierre* v. *Central Altagracia*, 217 U.S. 502, 507-508 (1910)). See also *Raleigh* v. *Illinois Dep't of Revenue*, 120 S. Ct. 1951, 1955 (2000) ("one who asserts a claim is entitled to the burden of proof that normally comes with it"); *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 291 (1959) (stating that "[t]he burden is, of course, upon respondents to establish that they are entitled to the benefit of the [statutory] exemption, since coverage apart from the exemption is admitted").

Applying the principle reflected in those cases to the NLRA, this Court has cautioned that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 399 (1996). The Board's rule, which places the burden of proof on the party claiming that individuals at issue are exempt from coverage as supervisors, adheres to that admonition.

The Board's rule also furthers the specific purpose behind the Act's exemption for supervisors. As we have described in detail, see pp. 27-31, *supra*, Congress intended that the Act's exclusion of supervisors from coverage would be limited, that the "employees [thereby] excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, *supra*, at 19. See also *Bell Aerospace*, 416 U.S. at 280-281, 283. The Board's rule effectuates that intention by placing the burden of proving supervisory status upon those invoking the exemption. "In contrast, placing the burden of proof on the Board[, as the court of appeals did here,] presumes that all employees simply asserted by employers to be supervisors are exempt from the Act's coverage until proven otherwise." *Grancare*, 137 F.3d at 378 (Moore, J., concurring in the judgment). That approach would undermine Congress's purpose to preserve the protections of the Act for all employees except those who possess "genuine management prerogatives." S. Rep. No. 105, *supra*, at 4.

B. Practical Considerations Also Support The Board's Rule

The Board's allocation rule also makes eminent sense because of the forum in which supervisory status under the Act is frequently litigated. Often, as in this case, the issue whether particular workers are supervisors arises in a representation proceeding rather than an unfair labor practice proceeding.[18] Indeed, the Act

[18] A representation proceeding is a proceeding conducted by the Board in response to a petition requesting that the Board direct an election to determine whether a particular union is the representa-

contemplates that such factual questions concerning the scope and composition of the appropriate bargaining unit will be resolved in representation proceedings, and it therefore provides for administrative hearings to resolve issues raised by representation petitions. 29 U.S.C. 159(c)(1). See *Barre-Nat'l, Inc.*, 316 N.L.R.B. 877, 878 (1995). See generally *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964); *AFL* v. *NLRB*, 308 U.S. 401 (1940).

Neither the Board nor its General Counsel has an advocacy role in representation proceedings. *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 393 n.7 (1989). Because the Board is not a litigating party to those proceedings, it is inappropriate to place an evidentiary burden in those proceedings on the Board. *Ibid.*; *Grancare*, 137 F.3d at 379 (concurring opinion). See also 29 C.F.R. 101.20(c). Rather, it is reasonable for the Board to place the burden of proving an employee's supervisory status on whichever actual party to the proceeding (the employer or the union) is asserting the claim that the employee is a supervisor.

An employer who receives an adverse ruling from the Board on a supervisory claim may (as respondent did here) precipitate an unfair labor practice proceeding by refusing to bargain with the certified union. See 29 U.S.C. 158(a)(5).[19] Although the General Counsel is a

tive of a particular bargaining unit of employees. See 29 U.S.C. 159(c).

[19] Although there is no judicial review of the Board's determination in a representation proceeding, *AFL*, 308 U.S. at 411, there is judicial review of a final order of the Board in an unfair labor practice proceeding. 29 U.S.C. 160(f). Congress's purpose in establishing this indirect method by which employers may challenge Board representation decisions in the courts was to forestall the delays that it feared would result if representation proceedings

party to an unfair labor practice proceeding, that circumstance does not warrant—let alone compel—a rule requiring the General Counsel to bear the burden of proving in that proceeding that disputed individuals in the bargaining unit represented by a certified union are not supervisors. The General Counsel bears the burden of proving only the elements of an unfair labor practice —the existence of a Board certification in favor of the union, a proper bargaining demand issued by that union to the employer, and a refusal by the employer to honor the union's demand. See, *e.g.*, *Unifirst Corp.*, 280 N.L.R.B. 75, 76 (1986). In the absence of newly discovered evidence or special circumstances, the General Counsel is not required to relitigate matters that were already decided in the underlying representation case. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941); *Unifirst Corp.*, 280 N.L.R.B. at 76. See also *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); 29 C.F.R. 102.67(f).[20]

In view of the reasonableness of the Board's allocation rule, its consistency with the Act, and the practical considerations that support it, other courts of appeals that have addressed the issue have upheld the Board's rule. See *Beverly Enters.-Mass., Inc.* v. *NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999); *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 412-413 (2d Cir. 1998); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). These rulings, of

were directly reviewable. See *Boire*, 376 U.S. at 478-479; *AFL*, 308 U.S. at 409-411 & nn. 2-3.

[20] Indeed, to require the General Counsel to relitigate such representation issues would defeat Congress's objective of securing a prompt resolution of those issues. See note 19, *supra*.

course, comport with the guidance provided by this Court's analogous precedent in *Transportation Mgmt. Corp.*, which upheld the Board's discretion to provide for a reasonable allocation of the burden of proof in another context. 462 U.S. at 403. The court of appeals erred in failing likewise to uphold the Board's allocation rule here.

III. THE RNs WORKING AT CANEY CREEK ARE NOT SUPERVISORS

Applying its interpretation of "independent judgment" and the rule that the burden of proving an employee's supervisory status falls on the party asserting it, the Board reasonably concluded that the RNs working at Caney Creek are "employees" rather than "supervisors." The court of appeals therefore erred in refusing fully to enforce the Board's order.

A. *Direction of LPNs and Rehabilitation Assistants.* The RNs working at Caney Creek "are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case." Pet. App. 16a; see J.A. 17. The RNs provide hands-on medical care to the residents, including providing medications, doing physical assessments of the residents, and taking care of complaints, such as stomach aches or cuts. J.A. 52; see also J.A. 31 (RNs also conduct treatment groups for residents). "[F]or the most part," the RNs "work independently and by themselves without any subordinates." Pet. App. 52a.

The "RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." Pet. App. 51a; J.A. 54. For example, the RN may direct an LPN to pass a particular medication to a particular resident at a particular time, or

direct a rehabilitation assistant to assist her in treating a resident who is "really acting out." See J.A. 18, 57-58, 59-61.

Neither the LPNs nor the rehabilitation assistants, however, report to the RNs; the LPNs report to the nursing coordinator, and the rehabilitation assistants report to the unit coordinators. J.A. 30, 34, 45, 61. Thus, in issuing directions, the RN acts as the more skilled member of a team. J.A. 51, 54, 57. The directions are based on the RN's experience and special professional competence and are circumscribed by the requirements of the resident's treatment plan. See J.A. 10-11, 12, 13, 46, 54, 70-75; p. 5 & note 1, *supra*. The Board therefore reasonably concluded that the RNs do not exercise "independent judgment" when they give directions to the LPNs and rehabilitation assistants. See Pet. App. 52a-53a; decisions cited on pp. 16-21 & notes 5-8, *supra*.

B. *Building Supervisor Responsibilities.* The Board also reasonably concluded that the RNs do not exercise "independent judgment" in carrying out any supervisory functions in their roles as building supervisors. Pet. App. 53a. There is no formal job description for the building supervisor position, and it carries no extra compensation. J.A. 37. There is no policy as to which of the two RNs on duty on a particular shift is the building supervisor. J.A. 37, 42, 51. The same RN may be an ordinary nurse on one day of the week and the building supervisor on another, or an ordinary nurse at the start of her shift and the building supervisor later in her shift. J.A. 22-23, 36, 42. The RNs are not notified at what point during their shift they assume their building-supervisor responsibilities. J.A. 50-51.

Although a memorandum issued by respondent states that the building supervisors are "in charge of the facility and all rehabilitation staff" (J.A. 62), the Board reasonably concluded that, as a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed" (Pet. App. 51a). The building supervisors do not consider themselves to be in charge of the rehabilitation staff. J.A. 50. Respondent's Administrator testified that the building supervisors' responsibility is "[p]rimarily to ensure that there's adequate coverage" and that coverage concerns prompted creation of the role. J.A. 18, 27; see J.A. 20.

Ensuring adequate staff coverage. The building supervisors' responsibilities with regard to staff coverage are routine and do not involve the exercise of independent judgment. Respondent's staffing policies specify the minimum number of employees necessary to cover a given shift. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another for the particular shift simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27. Because virtually no judgment is involved in making such a prescribed numerical assessment, the Board could reasonably conclude that the RNs do not act as supervisors in discharging this function. See Pet. App. 53a.

As the court of appeals found, when the RNs serve as building supervisors, they have authority to "call employees into work" or "ask employees to remain on duty," but they have no "authority to force an employee to work." Pet. App. 16a; see J.A. 19-20, 38. The Board correctly found that, in carrying out those functions, the RNs follow a procedure established by respondent that, as a practical matter, leaves them little room for the

exercise of judgment or discretion. Pet. App. 50a, 51a, 53a. J.A. 19-20, 28, 64. Moreover, the RN who testified in the representation proceeding stated that she calls one of the senior staff stipulated to be supervisors "before [she] even ask[s] somebody to stay over a couple hours." J.A. 52; see also J.A. 53. The Board reasonably concluded that the discharge of this function does not make the RNs supervisors, particularly since they cannot require an employee to work. Pet. App. 53a. See, *e.g.*, *Providence Ala. Med. Ctr.* v. *NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997) (finding similar duties "more clerical than supervisory"); *NLRB* v. *Harmon Indus., Inc.*, 565 F.2d 1047, 1050-1051 (8th Cir. 1977) (supervisory status not conferred by authority to request employees to work overtime on a voluntary basis); see also *NLRB* v. *Adco Elec. Inc.*, 6 F.3d 1110, 1118 (5th Cir. 1993) (employee not supervisor even though he requires other employees to work overtime on some occasions because he is "following company policy and [management's] instructions that overtime should be used to complete a job rather than incurring travel expenses to complete the work on a subsequent day").

Service as highest ranking employee on site. The court of appeals deemed it significant that the building supervisor "is the highest ranking employee in the building" for "almost two thirds of the day." Pet. App. 16a, 18a. A stipulated supervisor is, however, "on call" at those times. *Id.* at 16a; J.A. 39; see also J.A. 52, 53. As the Board has repeatedly concluded in cases involving various industries, the fact that an employee is the highest ranking employee on site for significant periods of time does not compel a finding that the employee is a

supervisor under Section 2(11).[21] Nothing in the definition of supervisor suggests that service as the most senior employee on site triggers supervisory status under the Act. 29 U.S.C. 152(11). See *VIP Health Servs., Inc.* v. *NLRB*, 164 F.3d 644, 649-650 (D.C. Cir. 1999) (if an employee "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it"); *Res-Care*, 705 F.2d at 1467 ("A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.").

Purported disciplinary authority. Finally, the Board reasonably concluded that respondent did not prove its contention that the RNs, acting in their capacity as building supervisors, have authority to discipline, or effectively to recommend discipline of, other employees. A memorandum issued by respondent stated that the RNs have authority to "write up" employees who do not "comply" with requests that they work their shifts on units that would otherwise be understaffed. Pet. App. 16a, 18a; J.A. 63. Further, as the court of appeals noted, respondent's Administrator testified that the RNs, when acting as building supervisors, have authority "[to] send an employee home, but the nurse would then need to inform that employee's immediate supervisor." Pet. App. 17a; J.A. 20-21, 26.

[21] See, *e.g.*, *Washington Post Co.*, 254 N.L.R.B. at 204; *Golden West Broadcasters-KTLA*, 215 N.L.R.B. at 762; *National Broad. Co.*, 160 N.L.R.B. at 1440-1441; *Security Guard Serv., Inc.*, 154 N.L.R.B. 8, 10 (1965), enforced, 384 F.2d 143 (5th Cir. 1967); *William C. Meredith Co.*, 74 N.L.R.B. 1064, 1068 (1947).

The Board discounted the significance of the RNs' putative authority to "write up" employees because there was "no evidence in the record that they have ever" done so. Pet. App. 51a; see J.A. 55-56. There was also no evidence in the record that the ability to "write up" another employee is a supervisory function that results in disciplinary action against the employee. To the contrary, the evidence suggested that any employee can document a possible disciplinary infraction by another employee in an "incident report," and the nursing or unit coordinator makes the decision whether discipline is appropriate. Pet. App. 51a; J.A. 14-15, 31. In the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. Pet. App. 51a. The record evidence also established that the RNs had never exercised their purported authority to send employees home. See J.A. 26-27, 38, 55-56.

Because respondent bears the burden of proving that the RNs are supervisors, see pp. 36-42, *supra*, the record supports the Board's conclusion (Pet. App. 52a) that the RNs do not have actual authority to "discipline" other employees or "effectively to recommend such action." 29 U.S.C. 152(11). See, *e.g.*, *Beverly Enters.*, 165 F.3d at 963 ("Statements by management purporting to confer authority do not alone suffice."); *Oil Workers Int'l Union* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971) ("the nearly total lack of evidence of authority actually exercised" negated "naked designations of 'paper power'"), cert. denied, 404 U.S. 1039 (1972); *NLRB* v. *Security Guard Serv., Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) ("A supervisor may have potential powers, but theoretical or paper power will not suffice."); *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) ("em-

ployer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions"), cert. denied, 359 U.S. 911 (1959). Cf. *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156 (described in note 7, *supra*).

Accordingly, under established principles applied by the Board and the courts in the administration of the Act in a wide variety of employment contexts, the Board's determination that RNs in this case are covered by the Act should have been upheld.

CONCLUSION

To the extent that the court of appeals held that the RNs employed by respondent are supervisors, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

LEONARD R. PAGE
General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

NOVEMBER 2000

(14)

Supreme Court, U.S.
FILED
NOV 17 2000

No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

59pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE FACTS	1
1. The Facility and its Supervisory Hierarchy	1
2. The Nursing Staff	1
a. The Regular Duties of the RNs	1
b. The Duties of the RNs Acting as Building Supervisor	4
3. Findings and Conclusions Below	6
a. The NLRB	7
b. The Court of Appeals	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. Judicial Deference Is Due to the Board's Reasonable Construction of Ambiguous Terms of the NLRA	15
A. Deference is Mandated by this Court's Prior Decisions In *HCR* and *Chevron*.	16
B. Judicial Deference to the Board's Routine and Repeated Sorting of Employees into Exempt and Nonexempt Categories Is Essential to the Administration of Federal Labor Policy.	17
C. This Court's Decision in HCR Provides No Grounds for Refusing Deference.	19

TABLE OF CONTENTS—Continued

Page

II. The Board's Construction of the Ambiguous Term "Independent Judgment" is a Rational and Permissible Construction of the Act. 20

A. Congress Did Not Intend to Exclude As Supervisors Employees Who Engage in Limited Assignment and Direction Based on Superior Skill or Experience 21

B. Congress Did Not Intend to Exclude Professionals, in Particular Nurses, as Supervisors Based on Directions Given to Less Skilled Employees Serving as Their Assistants 28

C. The Nurse Cases Fit Within the Board's Longstanding, Broadly Applied Supervisor Jurisprudence. 32

III. The Board Correctly Applied Its Reasonable Construction Of the Act To the Facts of this Case. 37

A. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Exemption 37

B. The Board's Factual Findings Are Supported by Substantial Evidence. 40

1. The Board Correctly Found that the RNs' Direction And Assignment Does Not Require Independent Judgment..... 40

a. The Assignment is Routine 40

b. The Direction is Routine 42

TABLE OF CONTENTS—Continued

Page

2. The Board Correctly Found that the RNs Do Not Have Any of The Other Duties Listed in Section 2(11). 43

a. Authority to "Write-up" Employees Is Not Authority to Discipline..... 43

b. RNs Do Not Have Authority to Send an Employee Home. 44

c. Being the Highest Ranking Employee Physically Present Does Not Make an Employee a Supervisor. 45

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

	Page
Abingdon Nursing Center, 189 NLRB 842 (1971)	35
Allentown Mack Sales & Service Inc. v. NLRB, 522 U.S. 359 (1998)	15
Aquatech, Inc., 297 NLRB 711 (1990), *enf'd*, 926 F.2d 538 (6th Cir. 1991)	34
Arlington Elec., Inc., 332 NLRB No. 74 (2000)	42
Avon Convalescent Center, Inc., 200 NLRB 702 (1972) *enf'd* 490 F.2d 1384 (6th Cir. 1974)	36
Bayou Manor Health Center, 311 NLRB 955 (1993)	36
Bethlehem Sparrows Point Shipyard, Inc., 65 NLRB 284 (1946)	26
Beverly Enterprises, Virginia, Inc. v. NLRB, 165 F.3d 290 (4th Cir. 1999)	30
Beverly Enterprises-Massachusetts, Inc., 329 NLRB No. 28 (1999)	36
Beverly Enterprises-Massachusetts, Inc. v. NLRB, 165 F.3d 960 (D.C. Cir. 1999)	38, 44, 45
Beverly Manor Convalescent Centers, 275 NLRB 943 (1985)	36, 45
ButteMedical Properties, 168 NLRB 266 (1967)	35
Central Cartage, Inc., 236 NLRB 1232 (1978)	32
Chevron Shipping Co., 317 NLRB 379 (1995)	45
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	16-17
Cities Serv. Oil Co., 75 NLRB 468 (1947)	34
Cooper/T. Smith, Inc. v. NLRB, 177 F.3d 1259 (11th Cir. 1999)	38

TABLE OF AUTHORITIES—Continued

	Page
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	39
Crittenton Hospital, 328 NLRB No. 120 (1999)	46
Department of Treasury, *IRS v. FLRA*, 494 U.S. 922 (1990)	17
Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994)	39
Diversified Health Services Inc., 180 NLRB 461 (1969)	35
Electric Auto-Lite Co., 76 NLRB 1189 (1948)	28
Endicott Johnson Corp., 67 NLRB 1342 (1946)	25, 26
Evangeline of Natichtoches, Inc., 323 NLRB 223 (1997)	41
Extendicare Health Facilities, Inc., 330 NLRB No. 193 (2000)	36
Federal Shipbuilding and Drydock Co., 55 NLRB 1438 (1944)	25
Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964)	18
Fordham University, 193 NLRB 134 (1971)	34
Frederick Confer & Assocs., 193 NLRB 910 (1971)	34
FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959)	29
FTC v. Morton Salt Co., 334 U.S. 37 (1948)	39
Garden of Eden Nursing Home, Inc., 199 NLRB 16 (1972)	35
General Dynamics Corp., 213 NLRB 851 (1974)	31, 34

TABLE OF AUTHORITIES—Continued

	Page
George Ehlenberger and Co., Inc., 77 NLRB 701 (1948)	28
Golden-West Broadcasters-KTLA, 215 NLRB 760 (1974)	34
Grancare, Inc. v. NLRB, 137 F.3d 372 (6th Cir. 1998)	38
H.J. Heinz Co., 77 NLRB 1103 (1948)	28
Health Care & Retirement Corp., 328 NLRB No. 156 (1999)	36
HeartShare Human Services of New York, Inc., 317 NLRB 611 (1995)	39
Highland Superstores, Inc. v. NLRB, 927 F.2d 918 (6th Cir. 1991)	42
Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997)	36
Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)	10
Integrated Health Services v. NLRB, 191 F.3d 703 (6th Cir. 1999)	38
Jackson Manor Nursing Home, 194 NLRB 892 (1972)	35
Leisure Hills Health Centers Inc., 203 NLRB 326 (1973)	35
Lidz Brothers, 5 NLRB 757 (1938)	25
Loyalhanna Care Center, 322 NLRB No. 86 (2000)	46
Madeira Nursing Center, 203 NLRB 323 (1973)	35
Marine Engineers Beneficial Ass'n v. Interlake S.S. Co., 370 U.S.173 (1962)	15, 18
Marymount College of Virginia, 280 NLRB 486 (1986)	34

TABLE OF AUTHORITIES—Continued

	Page
Massachusetts v. Morash, 490 U.S. 107 (1989)	28
Meharry Medical College, 219 NLRB 488 (1975)	36
Mid-America Care Foundation v. NLRB, 148 F.3d 638 (6th Cir. 1998)	15
Mountain Manor Nursing Home, 204 NLRB 425 (1973)	35
New Fern Restorium Co., 175 NLRB 871 (1969)	35
New York University Medical Center v. NLRB, 156 F.3d 405 (2d Cir. 1998)	38, 39
Newton-Wellesley Hospital, 219 NLRB 699 (1975)	36
NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974)	22
NLRB v. Brown & Sharpe Mfg. Co., 169 F.2d 331(1st Cir. 1948)	32
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)	17
NLRB v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999)	21, 40
NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994)	*passim*
NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)	19
NLRB v. Joy Recovery Tech. Corp., 134 F.3d 1307 (7th Cir. 1998)	38
NLRB v. KDFW-TV, Inc., 790 F.2d 1273 (5th Cir. 1986).	46
NLRB v. Meenan Oil Co. v. NLRB, 139 F.3d 311 (2d Cir. 1998)	44

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Res-Care, Inc., 705 F.2d 1461 (7th Cir. 1983)	30
NLRB v. Security Guard Service, 384 F.2d 143 (5th Cir. 1967)	45
NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4th Cir. 1982)	15, 16
NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995)	10
NLRB v. Winnebago Television Corp., 75 F.3d 1208 (7th Cir. 1996)	15
NLRB v. Yeshiva University, 444 U.S. 672 (1980)	30, 31, 35
North Dade Medical Complex, 210 NLRB 588 (1974)	36
North Star Specialty Co., 5 NLRB 763 (1938)	25
Northcrest Nursing Home, 313 NLRB 491 (1993)	45
Northern Montana Health Care Center v. NLRB, 178 F.3d 1089 (9th Cir. 1999)	38
Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947)	22
Packard Motor Car Co., 61 NLRB 4 (1945)	24
Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991)	16
Pennsylvania Power & Light Co., 122 NLRB 293 (1958)	34
Pine Manor Nursing Center, 270 NLRB 1008 (1984)	36
Pittsburgh Equitable Meter Co., 61 NLRB 880 (1945)	26

TABLE OF AUTHORITIES—Continued

	Page
Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941)	39
Plastics Industrial Products, Inc., 139 NLRB 1066 (1962)	34
Providence Hospital, 320 NLRB 717 (1996), *enf'd*, 121 F.3d 548 (9th Cir. 1997)	*passim*
Quadrex Environmental Co., 308 NLRB 101 (1992)	41
Rub-R Engraving Co., 89 NLRB 475 (1950)	34
Schnuck Markets, Inc. v. NLRB, 961 F.2d 700 (8th Cir. 1992)	15, 38
Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2d Cir. 2000)	44
Sherewood Enterprises, Inc., 175 NLRB 354 (1969)	36
Skidmore, Owings & Merrill, 192 NLRB 920 (1971)	31, 34
Sonotone Corp., 90 NLRB 1236 (1950)	34
Southern Bleachery & Print Works, Inc., 115 NLRB 787 (1956), *enf'd*, 257 F.2d 235 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959)	13
Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2d Cir. 1997)	15
Sterling Pulp & Paper Co., 77 NLRB 63 (1948)	28
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984)	10
Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270 (1st Cir. 1997)	18

TABLE OF AUTHORITIES—Continued

	Page
Ten Broeck Commons, 320 NLRB 806 (1996)	*passim*
The Arundel Corp., 53 NLRB 466 (1943)	25
The Austin Co., 77 NLRB 938 (1948)	28
The Door, 297 NLRB 601 (1990)	34
The Richards Chemical Works, Inc., 65 NLRB 14 (1945)	26
The S-P Mfg. Co., 75 NLRB 701 (1947)	28
U.S. Rubber Co., 30 NLRB 1074 (1941)	25
Union Elec. Power Co., 83 NLRB 872 (1949)	34
University Nursing Home Inc., 168 NLRB 263 (1967)	36
Vencor Hospital-Los Angeles, 328 NLRB No. 167 (1999)	42
Washington Nursing Home, 321 NLRB 366 (1996)	45
Westwood Health Care Center, 330 NLRB No. 141 (2000)	36
Wing Memorial Hospital Ass'n, 217 NLRB 1015 (1975)	36
Worden-Allen Co., 99 NLRB 410 (1952)	34
Wurster, Bernardi & Emmons, Inc., 192 NLRB 1049 (1971)	31, 34

STATUTES:

29 U.S.C. §152(3)	*passim*
29 U.S.C. §152(11)	*passim*
29 U.S.C. §152(12)	*passim*
29 U.S.C. §157	10

TABLE OF AUTHORITIES

MISCELLANEOUS:

	Page
Legislative History of the Labor-Management Relations Act, 1947 (1948)	*passim*
S. Rep. No. 93-766, 93rd Cong., 2d Sess. (1974)	35
H.R.Rep. No. 93-1051, 93rd Cong., 2d Sess. (1974)	35
N. Lichtenstein, "The Man in the Middle: A Social History of Automobile Industry Foremen," in N. Lichtenstein & S. Meyer, *On the Line: Essays in the History of Auto Work* 143 (1989)	24

BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

STATEMENT OF THE FACTS

1. *The Facility and its Supervisory Hierarchy*

The Kentucky River Community Care, Inc.'s Caney Creek Developmental Center (the facility) is a residential, mental health facility with 80 beds in two wings each with two units.

The facility is headed by an Administrator. Under the Administrator is an Assistant Administrator. The hierarchy then splits into three parts—service, rehabilitation, and nursing. Over the service employees there is a Maintenance and Housekeeping Manager and a Kitchen Supervisor. Over the rehabilitation employees, there are a Clinical Coordinator and two Unit Coordinators. The Unit Coordinators supervise the five Rehabilitation Counselors and 10 Rehabilitation Assistants who work on each unit. JA 8, 45. Over the nursing staff there is a Nursing Coordinator who supervises the six Registered Nurses (RNs) and three Licensed Practical Nurses (LPNs). JA 33-34.

2. *The Nursing Staff*

a. *The Regular Duties of the RNs*

The RNs and LPNs are responsible for the medical care of the residents. Two RNs are typically on duty during each of the facility's three shifts. Each nurse is responsible for one wing of the facility. It is not uncommon for an LPN to be on duty with a single RN, each taking a wing just like the shifts when there are two RNs. JA 47-48.

The RNs personally provide medical care to residents. The NLRB's Regional Director found, "The RNs are responsible for dispensing medication to the residents and for providing any other medical services ordered by a resident's physician or

psychiatrist." PA 50a. Asked to "describe what your job duties are," the one RN who testified stated, "When I come on, it's time for me to start the medications. And so I pass the medications at 1700 and 2100. And it takes over two hours to do the 2100 meds. I do physical assessments. . . . I take care of any complaints [the residents] have, such as stomach ache or maybe a cut or shaving cuts. . . . If it's something I can't handle, I call the doctor." JA 52. The Administrator's testimony confirms the RN's description: "the six RN's and LPN's . . . provide medical service and deal with providing medications, since . . . our residents are on sometimes very complicated medications." JA 8-9. "[T]hey even . . . work with the dietician if there are special diets for some of our people." JA 17. In addition to providing medical care, the RNs provide input into the formulation of treatment plans and run classes for the residents. JA 31-33.

The RN's and Administrator's descriptions of the duties of the RNs were consistent with that of their fellow employees. A Rehabilitation Assistant, asked if he had any relationship with RNs or LPNs, answered, "[I]f we have a resident really acting out I will go to the nurse or the RN's and say, this is what's going on, and we communicate that way. And we—we get together and we'll say well—they'll say, what do you think, and I'll say well—you know, it's kind of like back and forth. And then they usually—uh, either medication or something like that." JA 57-58. If a resident is feeling ill, the Rehabilitation Assistant reports it to nurse. JA 58.

No LPN testified, but, when asked, "Do you have any relationship with the LPN's," the RN who testified responded, "We work together as a team." JA 51. She further testified that her supervisor had told her "RNs and LPNs are the same at Caney Creek." JA 54. For example, when an RN and a LPN are working together on a shift, they decide "by mutual agreement" who will work which side of the facility. JA 48.

The RNs perform their duties largely independently. The Regional Director found, "the RNs including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." PA 52a. No employees report to the RNs and they do not act as the direct supervisor of any classification of employees.

The Unit Coordinators are the direct supervisors of the rehabilitation staff and the Nursing Coordinator is the direct supervisor of the nursing staff. The Unit Coordinator who testified, stated, "I supervise direct care staff, which is the 20 RA's and 10 rehab counselors." JA 45. Asked who his immediate supervisor was, one Rehabilitation Assistant responded, the Unit Coordinator. JA 61. If a Rehabilitation Assistant has a question, he or she asks a Unit Coordinators or Rehabilitation Counselor. JA 14. Rehabilitation Counselors report to a Unit Coordinator. JA 12. The Unit Coordinators evaluate the rehabilitation staff. JA 15. Rehabilitation staff bring their grievances to the Unit Coordinators. JA 34-35.

The Nursing Coordinator, according to the Administrator, has the responsibility of "[s]upervising nursing and all medical services." JA 33-34. Asked what job classifications she supervises, he responded, "The RN's and LPN's." JA 34. LPNs report to the Nursing Coordinator. JA 30. The Nursing Coordinator evaluates the LPNs. Tr. 141. If an RN becomes involved in a disagreement with an LPN, the RN does not have authority to resolve the problem but would call their supervisor—the Nursing Coordinator. JA 54. The Nursing Coordinator, according to the Administrator, is "like a department head." JA 38-39.

There is no dispute about the fact that the RNs performing their regular duties do not have 11 of the 12 supervisory duties set forth in § 2(11) of the National Labor Relations Act which defines the term "supervisor"—to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend such action.

The only possible question arising out of RNs' regular duties is whether the RNs have authority "responsibly to direct" other employees. The RNs play no role in the overall direction of employees' work; that is, the RNs do not assign duties to positions or instruct any other employees concerning their regular or ongoing duties. Rather, in personally caring for patients, the RNs occasionally obtain assistance from a less skilled employee. The Regional Director found that "RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take an action if the employee refuses." PA 51a. For example, a Rehabilitation Assistant may assist a resident in assuming an erect position so an RN can dispense medication or assist an RN treating a patient who is acting out. JA 58-60. An RN may request that an LPN give a particular medication to a resident. The RNs' only "responsibilities with respect to the LPN's," according to the Administrator, is to "ensure that they are—that the medications are passed at the right time to the right people." JA 18.

b. *The Duties of the RNs Acting as Building Supervisor*

RNs working on the second and third shifts and on weekends serve as "Building Supervisor." At these times, all conceded supervisors—the Administrator, the Assistant Administrator, the Clinical Coordinator, the Unit Coordinators, and the Nursing Coordinator—have left the facility, but one of them is always on call. JA 39. Although two RNs are typically on duty during these times, neither is in any way designated as *the* Building Supervisor. JA 36-37, 51. The RNs receive no additional compensation for serving as Building Supervisor and there is no position description for "Building Supervisor." JA 37.

The Regional Director found that the "only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." PA 51a. The RNs play no role in the initial assignment of employees to jobs or shifts. JA 18-19. The

Nursing Coordinator "schedules" the RNs and LPNs. JA 29, 34. The Administrator explained that the problem being addressed in designating the RNs as Building Supervisors was "situations . . . where they don't have enough people there, for whatever reason, and especially in bad weather." JA 27.

The judgment that additional employees are needed is routine. The Administrator explained that there was a need to have someone designated "to make the head count and to make the telephone calls." JA 27. In fact, the Administrator testified that the minimum staffing ratios were attached to a memorandum describing the Building Supervisor's duties. JA 30. Building Supervisors do not "decide how many employees are necessary to cover a shift" because "[t]here's a minimum coverage amount that was set," so "anytime it [– the ratio –] drops below the – the minimum coverage, they're authorized to—to get the extra coverage." JA 23, 22. In order to obtain additional staff in any other situation, "they would call the person on call and ask for additional approval." JA 22.[1] This "[d]oes not happen frequently." JA 24.

If additional employees are needed, the Regional Director found, the RNs will first attempt to obtain volunteers from among the employees on the departing shift and then, using a list, contact off-duty employees who live nearby. PA 51a. He found that the RNs have no authority to compel an employee to remain for another shift or to come in when off-duty. *Id.* The Administrator testified that he did not know of any employee ever having been ordered to come in when off-duty. JA 38. He acknowledged that RNs would not have authority to threaten discipline if an employee refused to work an extra shift. JA 38.

There is no evidence in the record of an RN ever performing *any* duty other than insuring minimum staffing while acting as Building Supervisor.

---

[1] In fact, the one RN who testified stated that she would call the manager on call before asking anyone to stay late or calling anyone to come in under *any* circumstances. JA 51-53.

The testimony concerning the Building Supervisor assignment was supplemented by three memoranda. JA 62-64. An RN testified that one of the memoranda was placed in the "Memo book" and nurses had to read and sign it. JA 48. It provides that in the event of inclement weather preventing employees from driving to work, "the R/N—Building Supervisor will call local employees first (A list of employees attached with local employees highlighted). . . . R/N—Building Supervisor will have the authority to ask employees to stay over until they have a replacement or there are 5 employees per wing plus a security guard." JA 64.

The RN testified that the second and third memoranda were discussed by the Nursing Coordinator, but she did not remember ever seeing them. JA 48-49.[2] One of these two memoranda states that the Building Supervisor "will be in charge of the facility and all rehabilitation staff." JA 62. The final memorandum provides, "when you come on duty, please check the staffing pattern and visit the units to check the coverage. If necessary, pull from one unit to another. Please write up anyone who does not comply with the request immediately." JA 63. The RN, the only witness who testified in any detail about these memoranda, stated that the Building Supervisor did not check the staffing pattern, didn't visit the units to check coverage,[3] and were not in charge of rehabilitation staff. JA 50.

3. *Findings and Conclusion Below*

The Union petitioned to represent the RNs, LPNs, Rehabilitation Counselors and Assistants, and Recreational Assistants. At the preelection hearing, the Employer contended, among other things, that the RNs are supervisors. Based on the hearing record, the Board's Regional Director concluded that the RNs are not supervisor. The Board denied a petition for

[2] The Nursing Coordinator who testified stated she had not seen *any* of the memoranda. JA 42-43.

[3] She explained that someone from a unit would report being short-staffed. JA 54-55.

review. The employees voted to be represented by the Union but the Employer refused to recognize the Union. The Board found the refusal unlawful, but the Court of Appeals denied enforcement of the Board's order on the grounds that the RNs are supervisors.

a. *The NLRB*

The Regional Director found that the RNs, in their normal capacity and as "building supervisors," "do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action." PA 52a. He further found that RNs, in carrying out their normal duties, "may occasionally request other employees to perform routine tasks." PA 51a. He also found that the RNs "have no authority to take any action if the employee refuses." *Id.* Finally, the Regional Director found that "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." *Id.* He found that this task was accomplished first by asking for volunteers among the departing employees and then by using a list of off-duty employees who live nearby. *Id.* He found that the Building Supervisors "do not have authority . . . to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Id.*

Based on these findings of fact, the Regional Director reached two legal conclusions. First, he concluded that the RNs' direction of less-skilled employees to perform discrete tasks was routine. Second, he concluded that because the "assignment" performed by RNs when serving as Building Supervisor was "pursuant to established policy" and was not mandatory, it did not require the exercise of independent judgment. The Regional Director therefore concluded that the Employer had not carried its burden of proving that the RNs were supervisors. PA 53a.

b. *The Court of Appeals*

The Court of Appeals rejected the decision of the Board by engaging in its own fact finding without any reference to the substantial evidence standard and by reaching its own legal conclusions. The Court's analysis is premised on its express refusal to grant deference to the Board's legal conclusions and its refusal to accept the Board's allocation of the burden of proof on this issue. PA 18a.

Concerning the RNs' regular duties, the Court of Appeals found only that the RNs are responsible for ensuring that the LPNs properly dispense medications. PA 17a. Concerning the RNs' duties when serving as Building Supervisor, the Court of Appeals relied exclusively on selected portions of the two memoranda the RN had never seen. The Court did not even acknowledge the existence of the memorandum in the Memo Book or the testimony on the subject. The Court accepted the following statements in the two memoranda as true: the Building Supervisor is "in charge of the facility and all rehabilitation staff," is "responsible for patient care and must ensure adequate staffing," and is authorized to shift staff between units and must "write up anyone who does not comply with the request immediately." PA 16a. The Court also found that the RNs acting as Building Supervisors can send employees home, but must then call the employees' immediate supervisor. PA 17A.

The Court's legal conclusion is stated in one paragraph:

> The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments. These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses. [PA 18a-19a.]

SUMMARY OF ARGUMENT

The Board's decision in this case rests on its construction of the term "independent judgment" in the National Labor Relations Act's (the Act's) definition of "supervisor." This Court has concluded that the term "independent judgment" is ambiguous. In construing that ambiguous term, the Board reasonably relied on clear expressions of congressional intent (1) not to exclude as supervisors skilled and experienced employees who work at a trade but who also, in the course of performing their own duties, assign and direct less-skilled employees, (2) to adopt the Board's preexisting definition of supervisor which did not encompass such employees, and (3) to protect professionals even though they both exercise independent judgment in performing their professional duties and often assign and direct junior colleagues and nonprofessional assistants.

In construing the ambiguous term "independent judgment" in light of these expressions of congressional intent, the Board has reasonably (1) set forth certain "guiding principles" for determining when employees' decisions are so constrained that they do not constitute the exercise of independent judgment and (2) required that the independent judgment be exercised in relation to the acts of supervision and not simply in the course of the skilled or professional employees' own work. The Board has relied on this construction since passage of the Taft-Hartley amendments, which introduced the supervisory exclusion, and has applied it across industries to a wide-variety of occupations. Rejection of the Board's reasonable construction of the ambiguous term would drastically contract the coverage of the Act contrary to Congress' intent.

The Board's application of its construction of the term "independent judgment" in this case is supported by substantial evidence. The Board's placement of the burden of proof on the party asserting the exemption is consistent with the treatment of exemptions under similar federal statutes, is a prudent method

of arriving at an accurate result, and is a permissible allocation of the burden of proving an affirmative defense.

ARGUMENT

Section 7 of the Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. This case presents the question of whether certain RNs are "employees" as defined in NLRA § 2(3) and, as such, are covered by § 7 or are "individual[s] employed as a supervisor" and, as such, excluded from § 2(3)'s definition of "employees" and outside of § 7's protective grant.

Section 2(3) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." 29 U.S.C. § 152(3). As this Court has often remarked, "the 'breadth of § 2(3)'s definition is striking.'" *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)).[4] And, to underline the breadth of the term "employee," and to make it plain that both § 2(3) and § 7 extend past manual laborers to highly trained individuals doing work requiring judgment, the Act's § 2(12) defines

> [t]he term 'professional employee' [to] mean[] . . . any employee engaged in work . . . involving the consistent exercise of discretion and judgment in its performance . . . [and] requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in

[4] The corollary of the breadth of §2(3) is that "reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

> an institution of higher learning or a hospital. [29 U.S.C. § 152(12)(a).]

As to "individual[s] employed as a supervisor," who are "not include[d]" in the statutory term "employee," NLRA § 2(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [29 U.S.C. § 152(11).]

Since the supervisory exclusion was introduced into the Act in 1947, in cases arising out of almost every industry and occupation, the Board has recognized that in drafting § 2(11) Congress intended to distinguish between true § 2(11) supervisors who are vested with "genuine management prerogatives" and "certain [§ 2(3)] employees with minor supervisory duties" such as "straw bosses, leadmen, set-up men, and other minor supervisory employees." S.Rep. No. 105, 80th Cong., 1st Sess. 4 (1947), reprinted in *Legislative History of the Labor Management Relations Act, 1947* at 410 (1948) (hereinafter *Leg.Hist.*). The nurse cases are informed by this congressional intent and fit within the Board jurisprudence implementing Congress' intent.

In this case, as in most cases concerning the supervisory status of nurses, there is *no* colorable contention that the "alleged supervisory RNs have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or to adjust their grievances." *Providence Hospital*, 320 NLRB 717, 725 (1996), *enf'd*, 121 F.3d 548 (9th Cir. 1997). Rather, here, as in most cases, the Employer's central contention is "that the[] disputed RNs

responsibly direct and assign employees and that their exercise of such authority requires the use of independent judgment." *Id.*

To put the foregoing in precise statutory terms, the §2(3)-employee/§2(11)- supervisor status of nurses and other skilled employees turns on the answers to two connected but distinct questions: (1) whether they "hav[e] authority . . . to . . . assign . . . other employees, or responsibly to direct them;" and (2) whether "the exercise of such authority . . . requires the use of independent judgment." 29 U.S.C. § 152(11).

The Board has concluded that the § 2(11) term "assign" "refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities" or to "calling in an employee or reassigning the employee to a different unit." *Providence*, 320 NLRB at 727. Determining whether such assignment is "routine" or "requir[es] the use of independent judgment" "depends on a careful analysis of the facts of each case." *Id.* In order to draw the distinction between "true supervisors" who exercise "genuine management prerogatives" and employees who perform "minor supervisory functions," the Board has set forth certain "guiding principles." *Id.* The Board has consistently found, and found here, that assignments made (1) on a "rational" or prescribed basis like a decision to "equalize employees' work on a rotational . . . basis," (2) to "meet the vagaries of manpower needs" or, in other words, simply to fill in gaps in regular assignments, or (3) "without authority to require" employees to accept the assignments, do not entail the exercise of "independent judgment." *Id.*

In construing the phrase "responsibly to direct," as used in § 2(11), the Board has "long recognized" that it is crucial to start from an understanding that in many trades and occupations "'there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate

employees,' who nevertheless are not supervisors within the meaning of the Act because their authority is based on their working skills." *Ten Broeck Commons*, 320 NLRB 806, 809-810 (1996) (quoting *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), *enf'd*, 257 F.2d 235 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959)). Congress' intent in this regard is most clear in relation to professionals, like nurses, who Congress expressly included as protected employees, while both defining them as employees who perform work "involving the consistent exercise of discretion and judgment" and recognizing that they routinely direct the work of junior professional colleagues as well as a variety of less-skilled assistants. 29 U.S.C. § 152(12).

The Board's careful attention to the relationship between the words in § 2(11) thus respects Congress' intent. A professional or other skilled employee is not a supervisor merely because his or her job involves both the exercise of discretion and the direction of other employees. Rather, the "[i]ndependent judgment must be exercised *in connection with the Section 2(11) function* if the actor is to be deemed a statutory supervisor; use of judgment in related areas of a professional or technical employee's own work does not meet the statute's language." *Providence*, 320 NLRB at 728 (emphasis added). In particular, the Board draws a "distinction between designing important and complex tasks and directing employees in carrying out these tasks." *Ten Broeck*, 320 NLRB at 811. If an employee exercises judgment in the former, i.e., "in designing . . . complex tasks," but not in the latter, i.e., "directing employees in carrying out these tasks," the employee is *not* a supervisor under the Board's construction of § 2(11). By way of clarifying this distinction, the Board gives as an example "designing a patient treatment plan[, which] . . . involve[s] substantial professional judgment, but . . . result[s] in wholly routine direction to the staff that implements that plan." *Providence*, 320 NLRB at 728.

The Board has thus held that "supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, [or] training." *Providence*, 320 NLRB at 729. Indeed, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) (*HCR*), this Court recognized that "in applying § 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *Id.* at 583. Examples of the type of direction that do not render an employee a supervisor are "the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training." *Providence*, 320 NLRB at 729.

Given the background provided by this Court's decision in *HCR*, which rejected the Board's "unique" "patient care analysis," 511 U.S. at 574, we hasten to emphasize that in deciding this case—and other post-*HCR* cases involving the question of whether nurses are "supervisors"—the NLRB is "apply[ing] the Board's traditional analysis for determining the supervisory status of employees in other occupations." *Providence*, 320 NLRB at 717. The Board's "traditional analysis" predates the Taft-Hartley amendments to the NLRA and was specifically endorsed by the Taft-Hartley Congress in adding the § 2(11) "supervisor" definition to the Act. Given its long tenure and sound footing in the statutory materials, the Board's traditional approach is entirely sound and correct in nurse cases as in the run of non-nurse cases.

I. JUDICIAL DEFERENCE IS DUE TO THE BOARD'S REASONABLE CONSTRUCTION OF AMBIGUOUS TERMS OF THE NLRA.

This Court has made clear that "of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.'" *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S.173, 179, n. 6 (1962). Deference is due the Board both because the Act's definition of supervisors contains ambiguous terms and because the statutory process for administering federal labor policy requires such deference.

Nevertheless, several courts of appeal, including the Sixth Circuit in this case, have *expressly* refused the mandated deference in § 2(11) supervisor cases. *See* PA 17a-18a.[5] *See also Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992). Courts have accused the Board of having a "policy bias" in this area. *See, e.g., NLRB v. St.*

[5] The specific grounds upon which the Sixth Circuit refused deference in the instant case were misguided. The Court below relied on *Mid-America Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998), but in that case, the Court held that the Board "correctly stated that '[i]ndependent judgment cannot be found where decisions are strictly regulated by specific employer policy.'" *Id.* at 643. The Court found, however, that the LPNs "engage in several supervisory activities that are not 'strictly regulated by specific employer policy.'" *Id.* This lead the Court to hold only that the Board's factual finding that its standard for the exercise of independent judgment was not met was not supported by substantial evidence. In so holding, the Sixth Circuit purported to rely upon *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). But *Allentown Mack* simply held that the substantial evidence test must be applied to the standard announced by the Board and not to a standard fashioned from the actual holdings of the Board. *Allentown*, thus, provides no support for the Sixth Circuit's refusing to defer to the Board's express construction of the ambiguous terms of the Act in this case.

Mary's Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982). But these courts have failed to understand that making policy judgments concerning ambiguous statutory terms is the *duty* of agencies like the Board. As this Court has observed, "resolution of ambiguity in a statutory text is often more a question of policy than of law" and "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

Given these decisions, we begin our elaboration of the legal points outlined in our introduction with a discussion of the roles of the Board and reviewing courts in § 2(3)-employee/§ 2(11)-supervisor cases.

A. Deference is Mandated by this Court's Prior Decisions In *HCR* and *Chevron*.

That deference is due the Board's construction of the terms in the Act's definition of supervisor at issue here is the inescapable conclusion resulting from the decisions in *HCR* and *Chevron*.

In *Chevron*, this Court held that when a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [enforcement] agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. In *HCR*, this Court held that several of the "phrases in § 2(11) such as 'independent judgment' and 'responsibly to direct' are ambiguous." 511 U.S. at 579. The Board's holding in this case rests on its construction of the ambiguous term "independent judgment." That this term is ambiguous is beyond dispute—every judgment made by an employee is to some extent constrained by employer objectives, policies, and commands and every judgment made by an employee is to some extent independent as no person is an automaton and no set of instructions, no matter how detailed, can cover every possible variation in circumstances. Thus, determining the meaning of

independent judgment requires drawing a line somewhere along the continuum between complete autonomy and total constraint—neither of which ever exist in the workplace.

The ambiguity in the term "independent judgment" brings to the surface the conflicting policies underlying the limited supervisory exclusion—the policy in favor of broad coverage of the Act and the policy in favor of granting employers unfettered authority over their labor relations agents. For as this Court has recognized, the task of construing ambiguous statutory terms is "infused with judgment and discretion, requiring the 'accommodation of conflicting policies that were committed to the agency's care.'" *Department of Treasury, IRS v. FLRA*, 494 U.S. 922, 933 (1990)(quoting *Chevron*, 467 U.S. at 845). Under this Act, "[t]he function of striking that balance . . . is often a difficult and delicate responsibility, which the Congress committed primarily to the . . . Board." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The combination of the holdings in *HCR* and *Chevron* requires that the courts defer to the Board's construction of the ambiguous phrase "independent judgment" as long as it is reasonable. Indeed, in *HCR*, this Court stated that the Board needs to be given "ample room" to apply these "ambiguous" statutory terms to "different categories of employees." 511 U.S. at 579.

B. Judicial Deference to the Board's Routine and Repeated Sorting of Employees into Exempt and Nonexempt Categories Is Essential to the Administration of Federal Labor Policy

Strict adherence to this requirement of deference in representation cases is critical to the enforcement of the Act for three reasons. First, the question of who is a supervisor is highly fact specific and arises in an almost infinite variety of work places, each with a different hierarchy and with authority distributed differently among employees. This Court has recognized that "the gradations of authority . . . from that of

general manager or other top executive to 'straw boss' are . . . infinite and subtle." *Marine Engineers*, 370 U.S. at 179 n. 6. As the First Circuit has put the point, "Given the myriad iterations of authority that are possible and the subtle distinctions that easily can be drawn, courts must afford great deference to the Board's expert determination of which workers fall into which classification." *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 274 (1st Cir. 1997).

Second, the often difficult question of who is a supervisor arises in every representation case that comes before the Board for the simple reason that all employers employ supervisors and each representation case requires the Board to draw a line between rank-and-file employees eligible to vote and supervisors not eligible to vote. Thus, as this Court recognized in *HCR*, determination of supervisory status "is, of course, part of the Board's routine . . . adjudicative function." 511 U.S. at 582.

Finally, broad, non-deferential judicial review of Board decisions concerning supervisory status, of the sort *expressly* applied in this case, impedes the representation process as the Courts of Appeal are asked to follow the Sixth Circuit's lead and find facts and review conclusions concerning individual supervisors. There is a statutory policy in favor of the expeditious resolution of disputes concerning employee representation. After all, the peaceful resolution of disputes concerning representation through the conduct of elections was the central purpose of the Act. *See Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.") When employers seek review of the results of elections in the Courts of Appeal by refusing to bargain with the employees' chosen union and forcing the Board to seek compliance in the Courts, however, the resolution of the dispute concerning representation is delayed for many months and often years. When routine administrative decisions concerning supervisory status are

regularly subject to the protracted process of review because of the refusal of deference, the statutory status of the NLRB is degraded and it is prevented from fulfilling its statutory duty to expeditiously resolve disputes concerning employee representation.

C. This Court's Decision in *HCR* Provides No Grounds for Refusing Deference.

In *HCR*, this Court did not decide whether nurses in general or even the nurses at issue in that case fit within the statutory definition of supervisors. This Court made clear that "[i]n cases involving nurses," the Board could "conclude that supervisory status has not been demonstrated." 511 U.S. at 583. What is more, the *HCR* Court did not even reach the statutory questions at issue here. Rather, this Court rejected the Board's construction of one term in the statutory definition—"in the interest of only the employer." *Id.* at 574. Indeed, this Court reiterated, "our decision casts no doubt on Board or court decisions interpreting parts of §2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Thus this Court did not indicate what a "proper test" for determining if nurses are supervisors would be or apply that test to the facts in *HCR*. *Id.* at 584.

The fact that this Court so corrected the course of the Board's nurse jurisprudence in *HCR* does not in any way "impair the validity" or detract from the deference owed the Board's subsequent construction of the Act. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975). After the decision in *HCR*, the Board requested that the parties and any interested amici address the impact of *HCR* and "the proper interpretation of 'assign,' 'responsibly to direct,' 'routine,' and 'independent judgment.'" in two cases. *See Providence*, 320 NLRB at 717, 727. One case arose in an acute-care hospital and the other in a nursing home. *See Providence*, 320 NLRB at 717; *Ten Broeck*, 320 NLRB at 806. Amicus briefs were filed by the Chamber of Commerce of the United States, the American Hospital

Association, the American Health Care Association, the AFL-CIO, the American Nurses Association, and many other interested parties and the Board heard oral argument. *Providence*, 320 NLRB at 717 n. 1. The decisions in these two cases reiterated the Board's long-standing construction of the term "independent judgment" and applied the construction to nurses.

As we stressed at the outset, the decisions in *Providence* and *Ten Broeck* do not represent a novel construction of the Act. Moreover, the Board did not abandon this construction during the relatively brief period it relied on the phrase "in the interest of the employer" to decide nurse supervisor questions, but rather simply did not reach the issue in most cases. Thus, nothing in *HCR* comes close to providing a ground for declining the Board's *Providence/Ten Broeck* analysis the normal deference due a reasonable agency construction of the ambiguous terms of its organic act.

II. THE BOARD'S CONSTRUCTION OF THE AMBIGUOUS TERM "INDEPENDENT JUDGEMENT" IS A RATIONAL AND PERMISSIBLE CONSTRUCTION OF THE ACT.

In this case, the Board concluded that the RNs did not exercise "independent judgment" either (1) in occasionally directing other employees to perform discrete tasks or (2) in determining that an existing staff-to-resident ratio was not met and requesting volunteers to work an extra shift. The construction of the ambiguous term "independent judgment" the Board applied to reach both these conclusions is rational and consistent with the language of the Act, its legislative history and the Board's longstanding case law outside of the healthcare industry.

A. Congress Did Not Intend to Exclude As Supervisors Employees Who Engage in Limited Assignment and Direction Based on Superior Skill or Experience.

Congress' careful choice of the words of § 2(11) of the Act was informed by its understanding that there are § 2(3) employees who exercise some authority over others but who are not § 2(11) supervisors. Congress expressed its intent to distinguish excluded § 2(11) supervisors from such included § 2(3) employees through the language of § 2(11) in two principal ways. First, Congress carefully chose the list of duties enumerated in § 2(11). Second, Congress provided that the exercise of the enumerated duties must require the "use of independent judgment" and not be "merely routine or clerical in nature."

The ambiguous term "independent judgment" is an appropriate vehicle through which to insure that Congress' intent that employees with only minor authority over others not be excluded from the Act's protections. As the Seventh Circuit recognized, "The concept of 'independent judgment' under § 2(11) is, at its core, concerned with those who work at the margins of supervisory authority." *NLRB v. Grancare, Inc.*, 170 F.3d 662, 667 (7th Cir. 1999). Congress intended the application of the independent judgment criteria to separate supervisors from "employees who exercise some authority but not enough to be considered more than part of the regular work force." *Id.* at 667-68.

In construing the term "independent judgment" to distinguish true supervisors from employees with minor authority over others, the Board has been true to Congress' intent. This intent is manifest in the legislative history in three respects: (1) in the explanation of the narrower Senate language and why it was adopted, (2) in the expressions of intent to exclude only foremen and those of like or higher rank, and (3) in the expressions of intent to adopt a definition of supervisor consistent with preexisting Board jurisprudence.

1. In *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267 (1974), this Court traced the origins of § 2(11) and explained its purpose and scope. As this Court explained, the original Wagner Act contained no exclusion of supervisors. Nonetheless, the NLRB from the first distinguished between "supervisory employees" and other "employees." At times the Board did so to exclude the former from the Act's coverage. But even when treating supervisory employees as covered, the Board distinguished them from other employees for purposes of defining appropriate bargaining units. The status of supervisory employees came to the fore during World War II when foremen in the war industries organized in significant numbers, the NLRB held their organization in separate units was protected by the Act, and this Court sustained the Board's conclusion in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). "The *Packard* decision was a major factor in bringing about the Taft-Hartley Act" in 1947. *Bell Aerospace*, 416 U.S. at 279.

Both the House and Senate bills that passed in 1947 contained provisions excluding supervisors from the definition of protected employees. *See id.* at 279-81. The Senate bill "defined that category more narrowly" and it was the Senate's narrower language that was adopted. *Id.* at 280, 282.

Discussion of the Senate bill's language makes clear that it was drafted and adopted to insure a narrow supervisory exclusion. The Senate Committee Report on the bill states:

> the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. [*Leg.Hist.* 410.]

The Committee indicated that it took "great care" that employees excluded from the coverage of the Act "be truly supervisory." *Leg.Hist.* 425.[6]

The narrower definition of supervisor contained in the Senate bill was adopted by the Conference Committee.

2. It is clear from the historical context and the discussion in Congress that the unionization of foremen was the immediate problem Congress intended to address in the amendment and that Congress understood the term supervisor to mean foremen and those of higher rank. It is also clear that Congress understood the term foremen to encompass employees who performed no manual work but rather supervised a department or like unit.

The House Conference Report explained that the adopted conference language "confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank." *Leg.Hist.* 539.[7] In a similar statement to the Senate after the conference, Senator Taft explained, "The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. . . . The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." *Leg.Hist.* 1537.

Throughout the legislative history are statements that make it clear that it was "unions of foremen" that Congress intended to put outside the Act's protection. *Leg.Hist.* 299. *See also*

---

[6] Criticism of the broader House language in that chamber mirrored the concerns of the Senate. The House Minority Report criticizes the broad definition in the rejected House bill as "sufficiently broad to cover a carpenter with a helper." *Leg.Hist.* 362. This same criticism was made on the floor. *See Leg.Hist.* 836.

[7] In fact, the broader House bill had been attacked on the floor on the grounds that it "not only excludes foremen and higher supervisory employees [but others as well]." *Leg.Hist.* 652.

Leg.Hist. 306-07, 410-11, 603, 1480, 1496, 1576. Senator Taft himself explained to the Senate that his "bill provides that foremen shall not be considered employees." *Leg.Hist.* 1008. *See also Leg.Hist.* 1519. Congressman Pepper stated the general understanding explicitly, "what [the bill] does, in substance, is to deny to supervisory personnel, whom we usually think of as foremen, the right of collective bargaining." *Leg.Hist.* 1167. In fact, congressmen often used the terms supervisors and foremen interchangeably. *See Leg.Hist.* 869, 993, 1606.

These clear statements that the exclusion of supervisors was intended to encompass only "foremen" and "persons of like or higher rank" are significant because the term "foremen" had a well-understood meaning in 1947. In fact, in the very case that Congress sought to overturn through adoption of §2(11), *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board had observed, "the status and duties of all classes of foremen at Packard is the same as that of foremen in other mass production industry. . . . At Packard each foreman is responsible for the quality and quantity of production of the workers under his supervision. None of the . . . foremen perform[] any manual work." *Id.* at 23.[8] The foremen "are in charge of one or more departments." *Id.* at 22. Thus, members of Congress understood the exclusion of supervisors to apply to foremen or department heads who did not themselves work at the trade but rather supervised all employees in a department and to persons of "like or higher rank."

3. The express adoption of the pre-existing Board jurisprudence also reveals Congress' intent not to exempt

[8] In fact, the main "contrast" between foremen and the "straw bosses, leadmen, [and] set-up men" who Congress did not intend to define as supervisors was that the latter "spent most of their time in actual production." N. Lichtenstein, "The Man in the Middle: A Social History of Automobile Industry Foremen," in N. Lichtenstein & S. Meyer, *On the Line: Essays in the History of Auto Work* 153, 157 (1989).

skilled employees who work at a trade and, as a result of training or experience, instruct or guide less-skilled employees.

"Even before the adoption of § 2(11) in 1947, the Board excluded supervisors from units of rank-and-file employees. In so doing, the Board classified "skilled and experienced employee[s] whose duties include instructing other employees and inspecting their work, but who work[] at production" as rank-and-file employees and *not* as supervisors. *North Star Specialty Co.*, 5 NLRB 763, 765 (1938). The Board followed this approach consistently from the period immediately after passage of the Act up to the adoption of the Taft-Hartley amendments even where the skilled employee functioned as the leader of a team, crew, gang or other work unit and even when during certain shifts (typically the evening or night shift) the skilled employee was the highest ranking employee on duty. *See, e.g., Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946) (employees who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work" not supervisors); *Federal Shipbuilding and Drydock Co.*, 55 NLRB 1438, 1439 (1944) (chargemen who assign work to and "direct and guide the work" of draftsmen not supervisors); *The Arundel Corp.*, 53 NLRB 466, 470-71 (1943) ("journeyman" who, during certain hours, was "in charge of the . . . yard" and who directs other employees, but also does manual work not supervisor); *U.S. Rubber Co.*, 30 NLRB 1074, 1077-78 (1941) (night shift "supervisors" who direct work of "skeleton crew," but spend 50 to 100% of their time on ordinary manual labor not supervisors); *Lidz Brothers*, 5 NLRB 757, 760 (1938) ("nominal heads of . . . departments" who, "to a limited extent supervise the work of the other employees," but who "also spend a considerable amount of time doing such work as is done by the other employees" not supervisors).

This pre-1947 case law is highly relevant because in *excluding* supervisors from the protection of the Act in 1947, Congress first endorsed the definition the Board had used to

place true supervisors in separate units from rank-and-file employees, and then rejected the Board's conclusion that supervisors, so defined, were covered by the Act and had the right to organize in separate supervisor bargaining units. The Senate Report expressly states, "the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file." *Leg.Hist.* 410. The Report then cites with approval several prior Board cases, including one that the Report's own parenthetical describes as involving "group leaders with authority to give instructions and to lay out the work." *Id.*[9] Senator Ellender[10] made similar comments in explaining the bill to the Senate. "[T]he definition adopted by our committee is the one that has been put into practice for several years last past by the NLRB." *Leg.Hist.* 1065. *See also Leg.Hist.* 1068. As explained above, the definition in the Senate bill, modeled on the existing Board jurisprudence, was adopted in conference and enacted into law.[11]

---

[9] The cited cases were *Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946) (summarized above); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284, 286-87 (1946) ("Timekeeper Leaders A" who each "direct[] the work of from 6 to 20 timekeepers and timekeeper leaders B" not supervisors); *The Richards Chemical Works, Inc.*, 65 NLRB 14, 16 (1945)("so-called foremen and assistant foremen" who "spend part of their time supervising and the balance in assisting in getting out the work" not supervisors); *Pittsburgh Equitable Meter Co.*, 61 NLRB 880, 882 (1945)("so-called supervisors" who "instruct and assign material to men who work under them in groups from 1 to 40" not supervisors).

[10] The explanatory comments of Senator Ellender are particularly noteworthy as he introduced an amendment to the definition of the term supervisor in the bill that passed in the prior session, but was vetoed by President Truman, upon which the language in the Taft-Hartley Act was based. *See Leg. Hist.* at 425 (language "patterned after that contained in the Ellender Amendment").

[11] Shortly before the Senate bill was passed, the phrase "responsibly to direct" was added to the definition of supervisor by an amendment offered by Senator Flanders. The Senator explained his amendment's purpose as follows:

> the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. . . .
>
> [A supervisor may be] charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. . . .
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as enumerated in the [Senate Committee] report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting. [*Leg.Hist.* 1303.]

In other words, Senator Flanders was concerned that the definition actually might not include foremen if all personnel functions other than the full-time direction of a group of employees in a department were centralized in a personnel department. His proposal was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them.'" *Leg.Hist.* 1304. The amendment passed by voice vote without further debate. *Id.* The amendment was thus intended to make clear that, consistent with the preexisting jurisprudence, employees like foremen and department heads, who direct the work of an entire department, but have none of the other duties enumerated in the original Senate language, are still supervisors.

Within months after the Taft-Hartley Act was enacted, the NLRB found itself called upon to interpret and apply the supervisory exclusion. The Board's initial decisions shed additional light on the contemporaneous understanding of § 2(11)'s import. Not surprisingly, in view of Congress' stated intent, the Board concluded that "[t]he definition of supervisors contained in section 2(11) of the act as amended is substantially a codification of the definition formulated and uniformly applied by the Board for several years before the amendment of

the statute." National Labor Relations Board, *Thirteenth Annual Report* 38 (1948). The Board thus continued to treat as employees, rather than supervisors, workers who exercised "minor" supervisory authority, such as "leadmen" who "work side by side with the other production employees" but whose "duties involve the direction or guidance of other employees in the course of production operations." *George Ehlenberger and Co., Inc.*, 77 NLRB 701, 703 (1948). *See also H.J. Heinz Co.*, 77 NLRB 1103, 1105-06 (1948); *The Austin Co.*, 77 NLRB 938, 943 (1948); *Sterling Pulp & Paper Co.*, 77 NLRB 63, 68 (1948); *Electric Auto-Lite Co.*, 76 NLRB 1189, 1193-94 (1948); *The S-P Mfg. Co.*, 75 NLRB 701, 704 (1947).

These clear expressions of Congress' intent not to exclude employees working at their trade or occupation who have limited authority to assign or direct based on their skill or experience have guided the Board's construction of the term independent judgment in two respects: (1) in the articulation of the principles used to distinguish between independent and routine judgment—because even leadmen and like workers who Congress clearly did *not* intend to classify as supervisors exercise some independence in assigning work and directing others; and (2) in requiring that the independent judgment be exercised in relation to the assignment and direction—because the skilled and experienced employees Congress did *not* intend to exclude exercise independent judgment in performing their own work and many incidentally assign and direct other employees.

B. Congress Did Not Intend to Exclude Professionals, in Particular Nurses, as Supervisors Based on Directions Given to Less Skilled Employees Serving as Their Assistants

This Court has made clear that "in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). In

particular, courts and agencies must "fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Thus the question of whether nurses are excluded from the protection of the Act as supervisors cannot be answered without considering the express inclusion of nurses as professional employees entitled to the Act's protection.

Congress defined professionals in the Taft-Hartley amendments of 1947 in order to grant them unique powers of self-determination. *See* 29 U.S.C. §§ 152(12), 159(b)(1). And, Congress clearly intended nurses to be classified as professionals. The Senate Committee Report explains that it was "careful in framing a definition to cover only strictly professional groups such as . . . nurses." *Leg.Hist.* 425. *See also id.* at 417.

The definitions of professional and supervisory employees are adjacent sections of the Act, both inserted by the same 1947 amendments. Section 2(12) defines a subset of § 2(3) employees. Section 2(11) operates as a proviso to § 2(3) that excludes a group of individuals from § 2(3). That much alone leads to the conclusion that Congress could not have intended for the § 2(11) exclusion from the category of employee to empty the § 2(12) subset of the category of employee of all or nearly all its contents.

"Yet, the two definitions contain parallel terms—both require that the employees exercise "judgment." *Compare* 29 U.S.C. § 152(11) (supervisor must have authority that "requires use of independent judgment") *with* 29 U.S.C. § 152(12) (professional must engage in work "involving the consistent exercise of discretion and judgment"). Moreover, Congress clearly understood that professional employees ordinarily direct the work of less skilled colleagues and assistants. In expressly providing for the coverage of professional employees, Congress also expressly recognized that they often direct more junior colleagues. Section 2(12) of the Act defines professionals to include both those who are independently performing

professional work and those who have completed their instruction and are "performing related work under the supervision of a professional person." As the Conference Report on the 1947 amendments makes clear, "This definition in general covers such persons as . . . medical personnel together with their junior professional assistants." *Leg.Hist.* 540. Indeed, virtually all professional employees make use of lesser trained employees to accomplish their professional duties. As Judge Posner observed in endorsing a "distinction between supervision in the statutory sense and work direction by a professional," "most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on." *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

The 1947 Congress that both adopted the supervisory exclusion and the professional employee inclusion thus expressed its awareness of the fact that professionals ordinarily direct less skilled colleagues and assistants and defined professionals to include only those who exercise judgment. That Congress could not have intended to take away with one hand what it granted with the other. This is not to suggest that a professional cannot be a supervisor, but it is to suggest, as Judge Phillips stated in dissent in *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999), that "Congress's express direction that professional employees remain under the Act's organizational protections notwithstanding their 'consistent exercise of discretion and judgment in [performing their work]' be also taken into account." *Id.* at 303.

This Court recognized that the express inclusion of professionals must guide the construction of the exclusions from the definition of employee in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress'

expressed intent to protect them." *Id.* at 690. In fact, this Court cited with approval Board holdings in which "architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members." *Id.* at 690 n. 30. In the cited cases, the Board found these professionals were not supervisors.[12] This Court stated, "We think these decisions accurately capture the intent of Congress." *Id.* at 690.

The Board has reconciled the inclusion of professionals and the exclusion of supervisors by careful attention to the statutory language which requires not simply that a supervisor exercise independent judgment but that the exercise of such judgment be essential to the performance of the enumerated supervisory duties. In *HCR*, this Court clearly indicated that only "an employee who in the course of employment uses independent judgment *to engage in 1 of the 12 listed activities* . . . is a supervisor." *Id.* at 579 (emphasis added). Thus, the fact that an employee uses independent judgment and directs other employees is not sufficient to make him or her a supervisor. The employee must use independent judgment in the direction of the other employee.

"In its first post-*HCR* decisions, then, the Board properly required evidence of the use of independent judgment in the performance of the § 2(11) duties and not simply in the carrying out of the professional's tasks. In *Providence*, the Board explained:

> [W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the

---

[12] *See General Dynamics Corp.*, 213 NLRB 851, 857-58 (1974); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971).

staff that implements that plan. Independent judgment must be exercised in connection with the § 2(11) function if the actor is to be deemed a statutory supervisor; use of judgment in related areas of a professional or technical employee's own work does not meet the statute's language. . . .

> Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training. [*Id.* at 728-29.]

See also Ten Broeck, 320 NLRB at 811.[13]

A clear example of this distinction is presented by the facts of this case. The RNs may exercise independent, professional judgment in deciding what medication to dispense to a resident, but the RNs do not exercise independent judgment in asking the one LPN on duty to deliver the medication.

C. The Nurse Cases Fit Within the Board's Longstanding, Broadly Applied Supervisor Jurisprudence.

In deciding post-*HCR* nurse cases the Board has followed its own long-standing § 2(11) jurisprudence as applied across a

[13] The Board has long been attentive to whether the independent judgment is exercised in relation to the § 2(11) functions in non-nurse cases as well. *See, e.g., Central Cartage, Inc.*, 236 NLRB 1232, 1247 (1978) (dispatcher uses "skill, specialized knowledge, and seasoned judgment . . . concern[ing] equipment availability" but does not act with "discretion in directing employees"); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948).

wide variety of occupations. In its first post-*HCR* cases, the Board made clear that it would treat nurses "the same as all other employee classifications and . . . apply to them the same test as [it] appl[ies] to all other employees." *Ten Broeck*, 320 NLRB at 810. In *Ten Broeck*, the Board observed:

> "[T]he LPNs' supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor. [320 NLRB at 811-12.]

The Board concluded, "we believe the definition of leadperson in *Southern Bleachery* aptly describes the LPNs as they are 'highly skilled employees whose primary function is physical participation in the . . . operat[ion] . . . of their employer's [business] and who incidentally direct . . . less skilled subordinate employees.'" *Id.* at 812 n. 11.

Southern Bleachery, cited by the Board in *Ten Broeck*, represents one of the Board's most extended descriptions of the jurisprudence at issue:

> Throughout the industry of this Nation, there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced coworkers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers. [citing Senate Report, *Leg.Hist.* 410]. The Board has, therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions, whose authority is based upon their working skill and experience. . . .

> For the Board to hold . . . that every craftsman, who has 1 or 2 helpers . . . is a supervisor and hence is to be denied the benefits of the Act, would be to eliminate a substantial part of the craftsmen in the Nation from the coverage of the Act and fly in the face of the demonstrated concern of Congress for craft units. [115 NLRB at 791-92.]

The Board has reached this conclusion in decisions dating from immediately after the adoption of the Taft-Hartley amendments to the present, arising out of almost every occupational category. In all these cases, the Board has held that leadmen, skilled employees, journeymen, and professionals who primarily work at their trade, but who also have limited authority to assign work and direct other employees, are not supervisors. *See, e.g., The Door*, 297 NLRB 601, 602 n.7 (1990)(doctor and lab technicians); *Aquatech, Inc.*, 297 NLRB 711, 716-17 (1990), *enf'd*, 926 F.2d 538 (6th Cir. 1991) (leadmen); *Marymount College of Virginia*, 280 NLRB 486, 489 (1986)(professional librarians and library technicians); *Golden-West Broadcasters-KTLA*, 215 NLRB 760, 762 n. 4 (1974)(directors); *General Dynamics Corp.*, 213 NLRB 851, 858-59 (1974)(professional engineers); *Frederick Confer & Assocs.*, 193 NLRB 910, 910 (1971)(architect "project captains" and "specification writers"); *Skidmore, Owings*, 192 NLRB at 921 (1971)(architect project managers and job captains); *Wurster, Bernardi*, 192 NLRB at 1051 (same); *Fordham University*, 193 NLRB 134, 138 (1971)(professor and secretary); *Plastics Industrial Products, Inc.*, 139 NLRB 1066, 1067-68 (1962)(leadmen); *Pennsylvania Power & Light Co.*, 122 NLRB 293, 295-96 (1958)(senior project engineer); *Worden-Allen Co.*, 99 NLRB 410, 414 (1952)(draftsmen "squad leaders"); *Sonotone Corp.*, 90 NLRB 1236, 1239 (1950)(engineers and associate and assistant engineers); *Rub-R Engraving Co.*, 89 NLRB 475, 476 (1950)(journeymen and apprentices); *Union Elec. Power Co.*, 83 NLRB 872, 879 n. 14 (1949)(accountants); *Cities Serv. Oil Co.*, 75 NLRB 468, 469-70 (1947)(chemists and lab assistants and junior chemists).

"By a parity of reasoning, after the Board in 1967 concluded that for-profit hospitals and nursing homes "substantially affect commerce" and hence were within the NLRB's jurisdiction, *see Butte Medical Properties*, 168 NLRB 266 (1967); *University Nursing Home, Inc.*, 168 NLRB 263, 264 (1967), the Board repeatedly found that the typical hospital and nursing-home RNs and LPNs were not clothed with sufficient authority to make them supervisors based on its existing jurisprudence. For example, in *Abingdon Nursing Center*, 189 NLRB 842, 850 (1971), the Board reasoned that the duties of an LPN Charge Nurse were "similar to those of a leadwoman" and not supervisory. *See also Mountain Manor Nursing Home*, 204 NLRB 425, 426 (1973); *Leisure Hills Health Centers, Inc.*, 203 NLRB 326, 326 (1973); *Madeira Nursing Center*, 203 NLRB 323, 324 (1973); *Garden of Eden Nursing Home, Inc.*, 199 NLRB 16, 23-24 (1972); *Jackson Manor Nursing Home*, 194 NLRB 892, 896 (1972); *Diversified Health Services, Inc.*, 180 NLRB 461, 461-62 (1969); *New Fern Restorium Co.*, 175 NLRB 871, 871 (1969).

To be sure, the Board's analysis in nurse cases became separated from its broader jurisprudence after the passage of amendments to the Act in 1974 that extended coverage to non-profit hospitals. This can be traced to passages in both the House and Senate Committee reports on the amendments commenting favorably on the fact that "existing Board decisions . . . . carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer." S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974); H.R.Rep. No. 93-1051, 93rd Cong., 2d Sess. 7 (1974).[14] While the Committees, in fact, did not accurately

[14] In fact, this Court commented in dicta in *Yeshiva* that "Congress expressly approved this approach in 1974." 444 U.S. at 690 n. 30.

summarize the existing case law, but rather took one phrase in a few cases as a categorical holding, the Board proceeded to adopt the dichotomy between acting in the interest of the patient and acting in the interest of the employer.[15] This was the origin of the "patient care analysis" rejected by this Court in *HCR*—the analysis the Board has accordingly abandoned in its post-*HCR* nurse cases in favor of its long-standing, generally applicable "independent judgment" analysis.[16]

The relationship between RNs and LPNs and between LPNs and nurses aides typifies the relationship between other professionals and their assistants, between craftspersons and helpers, and between skilled and less skilled employees. The

---

[15] In fact, even after the passage of the health care amendments, the Board in some cases continued to analyze nurse supervisor questions using the same principles it had always used. *See, e.g., Beverly Manor Convalescent Centers*, 275 NLRB 943, 947 (1985)(LPNs' direction of aides "is that of the industrial straw boss or leader, employees with modest authority but considerable skill, who are routinely excluded from the definition of supervisor"); *Meharry Medical College*, 219 NLRB 488, 490 (1975)(finding charge nurses' direction routine and that they "function more in the nature of lead persons").

[16] Employing this long-standing and generally applicable analysis, the Board has not simply held that nurses, by virtue of being nurses, are not supervisors. Rather, in many cases, the Board has held that nurses are supervisors under its test. *See, e.g., Extendicare Health Facilities, Inc.*, 330 NLRB No. 193 (2000); *Westwood Health Care Center*, 330 NLRB No. 141 (2000); *Beverly Enterprises-Massachusetts, Inc.*, 329 NLRB No. 28 (1999); *Health Care & Retirement Corp.*, 328 NLRB No. 156 (1999); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); *Bayou Manor Health Center*, 311 NLRB 955, 955 (1993); *Pine Manor Nursing Center*, 270 NLRB 1008, 1008-09 (1984); *Newton-Wellesley Hospital*, 219 NLRB 699, 699-702 (1975)(supervisors, nurse leaders, and assistant supervisors are supervisors, head nurses are not); *Wing Memorial Hospital Ass'n*, 217 NLRB 1015, 1016-17 (1975)(shift supervisors are supervisors, but head nurses are not); *North Dade Medical Complex*, 210 NLRB 588, 592 (1974); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 705-06 (1972), *enf'd*, 490 F.2d 1384 (6th Cir. 1974). *Sherewood Enterprises, Inc.*, 175 NLRB 354, 354-55 (1969); *University Nursing Home*, 168 NLRB at 265.

Board has decided this case on the same grounds on which it has decided a myriad of other cases from other industries. The position of a nurse in a residential facility like this one is no different than that of a skilled carpenter building a house under § 2(11). They both coordinate the work of less skilled employees and occasionally direct their work. Neither is a supervisor under the Board's jurisprudence. Rejection of the Board's position in this case will have profound ramifications for national labor policy and drastically contract the coverage of the Act. The Board's holding that the limited form of assignment and direction engaged in by the RNs in this case does not require the use of independent judgment is reasonable and consistent with the Act and thus must be sustained.

III. THE BOARD CORRECTLY APPLIED ITS REASONABLE CONSTRUCTION OF THE ACT TO THE FACTS OF THIS CASE.

A. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Exemption.

In *HCR*, this Court set out the basic framework for determining whether an employee is a supervisor as follows:

> [T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer"? [511 U.S. at 573-574.]

In other words, it must first be established by record evidence that an individual is an "employee" of the employer, and then, before that "employee" will "be deemed a supervisor," it must be established by record evidence that each of the three questions identified in *HCR* are to be "answered in the affirmative."

The NLRB treats an employer claim "that certain of its [employees] who voted in [a representation] election are statutory supervisors under [*HCR*], and should be excluded from the unit" as an "affirmative defense[]." *HeartShare Human Services of New York, Inc.*, 317 NLRB 611 (1995). And, in the instant case, the Board concluded that "the Employer has not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act," PA 53a, in that the employer did not produce evidence supporting affirmative answers to the first two of the questions identified in *HCR*.

In reversing the Board, the Sixth Circuit ruled that the "NLRB has the burden of proving that employees are not supervisors." PA 15a (court's brackets omitted), quoting *Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6th Cir. 1998). *But see id.* at 378-379 (Moore, J., dissenting). As Judge Jones of the Sixth Circuit—who filed a dissent below—has observed, the Sixth Circuit is "the only circuit that requires the Board to prove that employees are not supervisors." *Integrated Health Services v. NLRB*, 191 F.3d 703, 713 (6th Cir. 1999) (Jones, J., dissenting).[17] In this regard, the allocation of this burden approved by all of the circuits—other than the Sixth—is eminently sound.

In *New York University Medical Center*, Judge Jacobs of the Second Circuit explained the unimpeachable legal grounds for requiring the employer to bear this burden:

---

[17] *See New York University Medical Center v. NLRB*, 156 F.3d 405, 412-13 (2d Cir. 1998); *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089, 1094 (9th Cir. 1999); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999); *Beverly Enterprises--Massachusetts, Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

> It is evident . . . that supervisory status is a statutory exception, separately stated, to the provisions of the Act that extend its coverage to all employees. The applicable rule of statutory construction is that the party claiming the benefit of such an exception must demonstrate its applicability. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). In other words, the [contested individuals] *are* employees, and they may or may not *also* be supervisors, which would take them outside the ambit of the Act. The NLRB bears . . . the burden of demonstrating that the [contested individuals] are employees of [the employer]; the burden of establishing that they are supervisors is on the [employer]. [156 F.3d at 413 (emphasis in original).][18]

This approach, we would emphasize, is consistent with that followed under the Fair Labor Standards Act, where "the general rule [is] that the application of an exemption . . . is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). *See also Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (the NLRB's approach of "plac[ing] the burden of persuasion on the employer as to its affirmative defense" is "consistent with § 7(c)" of the Administrative Procedure Act).

The Board's approach here—and the general approach it exemplifies—is not a mere matter of form but one grounded in the logic of the situation. As Judge Moore of the Sixth Circuit

---

[18] The fact that *New York University Medical Center* was a §8(a)(3) case involving alleged employer retaliation for union activity and the instant case arises under §8(a)(5) makes no analytical difference. The only practical difference between the two types of cases is that in the latter—where the employer is challenging the certification issued by the Board in an earlier representation case—the Board will not allow the employer to relitigate the supervisory issue unless "it allege[s] . . . special circumstances that would require the Board to reexamine the decision made in the representation proceeding." *Heart Share Human Services*, 317 NLRB at 611. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

has explained, "placing the burden of proof upon the Board requires proof of a negative—proof that an employee does not exercise *any* of the twelve statutory indicia of supervisory status when using independent judgment," whereas "placing the burden of proof on the employer, the party with superior access to the relevant proof, would narrow the inquiry from all twelve enumerated activities to the specific supervisory activities in which the nurses allegedly participate." *Grancare*, 137 F.3d at 379 (dissenting opinion; emphasis in original).

B. The Board's Factual Findings Are Supported by Substantial Evidence.

1. *The Board Correctly Found that the RNs' Direction And Assignment Does Not Require Independent Judgment.*

a. The Assignment is Routine

The Board correctly found that the RN/Building Supervisors' function to insure that the established staff-to-resident ratio is maintained does not require the exercise of independent judgment but is routine. This factual finding is supported by the following substantial evidence.

First, the RNs play no role in assigning staff to shifts or positions on a permanent basis. JA 18-19. The Board observed in *Providence* that this was "the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment." 320 NLRB at 731.

Second, the RNs play no role in setting the staff-to-resident ratio. JA 23-24.

Third, the judgment that additional staff is needed is a matter of counting heads and comparing the outcome to the preestablished ratio. The Administrator testified, "Well they would determine from—I mean the numbers are already there. So they, by counting the number of bodies in the building they can determine whether or not it's [necessary to obtain additional

staff]." JA 23.[19] The RNs cannot seek additional staff for any other reason without the approval of the conceded supervisor on call. JA 24.

Fourth, the RNs do not have authority to require employees to stay for another shift or to come in from off-duty. JA 38.

Fifth, the need to secure additional staff from off the premises rarely arises. For example, it did not happen in the entire month prior to the hearing in this case. JA 43.

"Finally, a conceded supervisor is always on call if any non-routine question concerning staffing arises.

Thus, substantial evidence supports the Board's finding, guided by the "principles" set forth in *Providence*, that the limited assignment did not require independent judgment. First, the decision to seek additional personnel was made on a "rational" or prescribed basis—the prescribed staff-to-resident ratio—like a decision to "equalize employees' work on a rotational . . . basis." 320 NLRB at 727. Second, the decision was made only to "meet the vagaries of manpower needs." Id. In other words, the RNs did not make permanent assignments, but only filled in gaps in those assignments on occasion. Finally, the RNs merely "ask[]ed, without authority to require," employees to work an extra shift. *Id.* Such a request does not constitute the exercise of independent judgment because it has to be concurred in either by the employee or by a conceded supervisor if no volunteer can be found.[20]

---

[19] Building Supervisors can transfer an employee from one unit to another only for the same reason and under similar circumstances – "[t]o make sure the head count is there." JA 28-29.

[20] The Board has reached the same conclusion in many cases arising inside and outside the health care industry. *See, e.g., Evangeline of Natichtoches, Inc.*, 323 NLRB 223, 224 (1997); *Quadrex Environmental Co.*, 308 NLRB 101, 107 (1992).

- b. The Direction is Routine.

The Board's finding that, while the RNs might exercise independent judgment in carrying out their professional duties, they do not exercise such judgment in delegating discrete tasks to others is supported by the following substantial evidence.

First, the only examples of this form of delegation in the record involve discrete and simple tasks performed to assist the RNs in the performance of their own professional duties. The RN directs the LPN to dispense particular medications to particular residents. The RN asks a Rehabilitation Assistant for help in treating a patient who is acting out. In fact, the Administrator explained that these simple tasks are delegated in order to save the RNs' time. "The idea of having the LPN's was to have them primarily pass the medications, because that—it is time consuming, and not a good use of the RNs time." JA 29.

Second, there is no evidence in the record that the RNs choose from among a group of employees when delegating tasks. There is only one LPN on duty to dispense medications for the RN. JA 16 (only two nurses on duty each shift, one RN and one LPN). Similarly, the Rehabilitation Assistant who assists an RN in treating a resident who is acting out or who assists the patient to get up to take medication is the Rehabilitation Assistant assigned to the unit containing the resident.

Finally, such direction is a minor and ancillary element of the RNs' own professional duties of caring for residents.[21]

---

[21] The Board has reached the same conclusion in many cases arising inside and outside the health care industry. *See, e.g., Vencor Hospital-Los Angeles*, 328 NLRB No. 167 at 4 (1999); *Arlington Elec., Inc.*, 332 NLRB No. 74 at 1-2 (2000). The Sixth Circuit, outside the nurse context, has also recognize the distinction between performing complex tasks that require independent judgment and delegating discrete elements of those tasks to other less-skilled employees. *See Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991).

2. *The Board Correctly Found that the RNs Do Not Have Any of The Other Duties Listed in Section 2(11).*

The Sixth Circuit found that the RN/Building Supervisors have authority to "write up" other employees and to send an employee home, and serve as the highest ranking employees physically present in the facility. PA 16a-17a. But the Board's finding that the RNs do not have any of the duties listed in §2(11) other than assignment and direction is supported by substantial evidence.

a. Authority to "Write-up" Employees Is Not Authority to Discipline.

The Regional Director found that the RNs "do not have the authority to . . . discipline employees or to effectively recommend such action." PA 52a. This finding is supported by substantial evidence.

"The RNs' authority to "write-up" other employees is not the authority to discipline or even to effectively recommend discipline but merely a duty to report. The Regional Director found that RNs may complete incident reports, but "so can any other employee." PA 51a. Such reporting is done by anyone in the facility who observes a problem with another employee's work. JA 14-15, 31. The reports, including those made by the RNs, do not include any recommendation for discipline or other action. These incident reports are given to the Administrator and the Unit Coordinators. JA 14. The decisionmaker concerning whether the facts reported merit discipline is the Unit Coordinator. JA 31. Incident reports completed by RNs carry no special weight. Rather, "[a]ll incident reports are independently investigated by the Nursing or Unit Coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved." PA 51a. The only evidence in the record concerning a complaint by an RN concerning another employee

is that an RN complained about an LPN who was abusive and did not follow her directions and no action was taken. PA 51a-52a. Even when acting as Building Supervisor, RNs have no authority to discipline or even threaten discipline of an employee who refuses to work an extra shift. JA 38.[22]

b. RNs Do Not Have Authority to Send an Employee Home.

Although it did not rely on the observation in reaching its legal conclusion, the Court of Appeals observed that an RN/Building Supervisor "could send an employee home." PA 17a. However, substantial evidence supports the Board's finding that "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." PA 51a.

First, no RN has ever sent an employee home. JA 26, 38, 55-56. Only in response to a hypothetical question did the Administrator speculate that an RN might "ask" an employee to leave the building. JA 20.

Second, there is no evidence that RNs were every told they had this authority. Not one of the three memoranda describing the Building Supervisor's duties mentions this authority. Inside and outside the healthcare industry, the Board has long held that granting authority on paper (which was not even done in this case) but not in practice does not make an employee a supervisor. *See, e.g., Beverly Enterprises-Mass., Inc. v. NLRB*,

[22] Inside and outside the healthcare industry, Courts of Appeals have uniformly agreed with the conclusion that reporting facts is not the same as imposing or effectively recommending discipline. *See, e.g., Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 266 (2d Cir. 2000); *NLRB v. Meenan Oil Co. v. NLRB*, 139 F.3d 311, 322 (2d Cir. 1998); *Telemundo*, 113 F.3d at 275. Outside the nurse cases, the Sixth Circuit has agreed that "the mere reporting of facts is not enough to make the reporter a supervisor." *Highland*, 927 F.2d at 922.

165 F.3d 960, 962-63 (D.C.Cir. 1999); *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967).[23]

c. Being the Highest Ranking Employee Physically Present Does Not Make an Employee a Supervisor.

Being the highest ranking employees physically present in the facility is not among the duties listed in § 2(11). Supervision and status are two different things. A supervisor is not a high ranking official or even the highest ranking official, but an employee who performs the duties specified in § 2(11).

At most, being the highest ranking employee on duty is circumstantial evidence that the employee performs relevant duties. It is weak circumstantial evidence here because of the facts that a conceded supervisor is always on call and that RNs serve as Building Supervisors only on the second and third shifts and on weekends when residents are asleep for a large portion of the time or there is less resident and staff activity. As the Board observed in another case, "Little happens at night in a care center setting." *Beverly Manor*, 275 NLRB at 947. Under these circumstances, exercise of the § 2(11) functions can be

[23] Moreover, even if RNs actually have such authority, it would only be in the event of egregious misconduct constituting an obvious violation of the rules such as an employee becoming "insubordinate or unruly" or "intoxicated." JA 20. Inside and outside the healthcare industry, the Board has repeatedly held that such "offenses are obvious violations of the employers' policies and speak for themselves" so that sending an employee home for such conduct does not require independent judgment. *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993). *See, e.g., Washington Nursing Home*, 321 NLRB 366, 366 n. 4, 371-72 (1996); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Finally, such authority would be exercised to protect the facility not to discipline employees. The decision on discipline would be made later by a conceded supervisor. The RNs would be "required to report that immediately to probably that person's supervisor" and what disciplinary action should be taken would be a question of "normal personnel action"—*i.e.*, it would not be determined by the Building Supervisor. JA 20, 25.

deferred to the next business day or handled by the supervisor on call. "In today's modern world of beepers, cordless phones, and fax machines, a supervisor need not be physically present to exercise supervision over the workplace." *Grancare*, 137 F.3d at 383 (Moore, J., dissenting).[24]

The Court of Appeals cites the language in the undated memorandum concerning Building Supervisors (that the RN who testified had never seen) that the Building Supervisor is "in charge of the facility and all rehabilitation staff." PA 16a. However, not only did the RN testify that she was not in charge of any rehabilitation staff, such vague, paper pronouncements are not evidence of supervisory status. They do not vest any specific authority described in § 2(11).[25]

The Board's finding that being the highest ranking employee physically present in the facility did not give the RNs any of the authority required by § 2(11) is supported by substantial evidence. Thus, the Board's finding that the RNs do not perform any of the functions listed in § 2(11) other than assignment and direction, like the Board's finding that the RNs do not exercise independent judgment in their limited assignment and direction is supported by substantial evidence.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be reversed.

---

[24] In cases involving both nurses and other types of employees, the Board has often concluded that being the highest ranking employee in the workplace does not render an employee a supervisor. *See, e.g., Loyalhanna Care Center*, 322 NLRB No. 86 at 4 (2000); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986).

[25] Thus, inside and outside the healthcare industry, the Board has consistently held that merely designating an employees as "in charge" does not make them a supervisor. *See, e.g., Crittenton Hospital*, 328 NLRB No. 120 (1999); *Golden West*, 215 NLRB at 762 n. 4.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*

Dec 22, 2000

Supreme Court, U.S.
FILED
DEC 22 2000
CLERK

No. 99-1815

In The

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT KENTUCKY RIVER COMMUNITY CARE, INC.

MICHAEL W. HAWKINS*
LOUISE S. BROCK
CHERYL E. BRUNER
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board erroneously determined that Registered Nurses who exercise professional or technical judgment along with their own judgment in responsibly directing other employees in the interest of the employer are not "supervisors" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11).

2. Whether the Board should have the burden of proving that an individual is an "employee" rather than a "supervisor" under the NLRA and thus entitled to the rights and protections afforded by the Act.

3. Whether substantial evidence on the record as a whole warrants rejection of the Board's conclusion that the Employer's six RN Building Supervisors are employees rather than supervisors under the Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Kentucky River Community Care, Inc. has no parent corporation and there is no publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. The Board's interpretation of "independent judgment" is irrational, arbitrary, and inconsistent with the Act 8

A. The Board's interpretation is a disguised attempt to revive the patient care analysis and creates a false dichotomy between professional judgment and independent judgment 9

B. The Board's interpretation frustrates the legislative intent behind both the phrase "responsibly to direct" and the Act's exclusion of supervisors 13

C. The Board's interpretation will eliminate professionals as supervisors 17

D. Deference to the Board is not required because the Board has engaged in blatant manipulation of the statute to further policy rather than following the text and intent of the statute 21

II. The Board should have the burden of proving an individual is not a supervisor because the Board is the party alleging that an individual is an "employee" under the Act and entitled to protection of the Act 24

TABLE OF CONTENTS – Continued

Page

III. The evidence in the record as a whole demonstrates that the six RNs at Caney Creek are supervisors under the Act 26

A. The RN Building Supervisors exercise independent judgment beyond, as the Board terms it, "ordinary professional or technical judgment" 28

B. If the RNs are not supervisors, then an entire staff and all its patients have no on-site supervision, and the ratio of supervisors to employees is unreasonable 36

C. The Board improperly refused to recognize the authority granted to the RNs by management 40

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Allentown Mack Sales & Service, Inc. v. N.L.R.B., 522 U.S. 359 (1998) 8, 26, 40

Avon Convalescent Center, Inc., 200 NLRB 702 (1972), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993) 11, 23, 40, 41

Beverly California Corp. v. N.L.R.B., 970 F.2d 1548 (CA6 1992) 10, 16, 38, 40

Beverly Enterprises v. N.L.R.B., 148 F.3d 1042 (CA8 1998) 24, 38

Beverly Enterprises-Pennsylvania, Inc., v. N.L.R.B., 129 F.3d 1269 (CADC 1997) 12

Beverly Enterprises, Virginia, Inc. v. N.L.R.B., 165 F.3d 290 (CA4 1999) 7, 21, 29, 37

Burlington Industries v. Ellerth, 524 U.S. 742 (1998) 41

Caremore, Inc. v. N.L.R.B., 129 F.3d 365 (CA6 1997) .. 12, 26

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 21, 22

Children's Habilitation Center, Inc. v. N.L.R.B., 887 F.2d 130 (CA7 1989) 22

Clark & Wilkins Industries, Inc., 290 NLRB 106 (1988), aff'd, 887 F.2d 308 (CADC 1989), cert. denied, 495 U.S. 934 (1990) 23, 24

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938) 27

TABLE OF AUTHORITIES – Continued

Page

Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc., 512 U.S. 267 (1994) 7, 25

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 41

Florida Power & Light Co. v. International Brotherhood of Elec. Workers, Local 641, 417 U.S. 790 (1974) 6, 16, 25

Great American Products, 312 NLRB 962 (1993) 23

Integrated Health Serv. of Michigan v. N.L.R.B., 191 F.3d 703 (CA6 1999) 10, 12, 18, 19

Mid-America Care Foundation v. N.L.R.B., 148 F.3d 638 (CA6 1998) 7, 21, 22

N.L.R.B. v. Attleboro Assoc., Ltd., 176 F.3d 154 (CA3 1999) 7, 9, 12, 21

N.L.R.B. v. Beacon Light Christian, 825 F.2d 1076 (CA6 1987) 10, 36

N.L.R.B. v. Grancare, Inc., 170 F.3d 662 (CA7 1999) ..30, 38

N.L.R.B. v. Health Care & Retirement Corp., 511 U.S. 571 (1994) ..... *passim*

N.L.R.B. v. Medina County Publications, Inc., 735 F.2d 199 (CA6 1984) 40

N.L.R.B. v. Winnebago Television Corp., 75 F.3d 1208 (CA7 1996) 22

N.L.R.B. v. Yeshiva University, 444 U.S. 672 (1980) 6, 16, 28

National Living Centers, Inc., 193 NLRB 638 (1971) 23, 34, 35, 36

Newton-Wellesley Hospital, 219 NLRB 699 (1975) 31, 32, 33, 35

TABLE OF AUTHORITIES – Continued

Page

North Dade Hospital, Inc., 210 NLRB 588 (1974) 30

Nymed, Inc., 320 NLRB 806 (1996)..... 10, 14, 31, 35

Pine Manor Nursing Center, 270 NLRB 1008 (1984)...36, 40

Providence Alaska Medical Center v. N.L.R.B., 121 F.3d 548 (CA9 1997) 18, 29

Providence Hospital, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (CA9 1997)..... *passim*

Rockville Nursing Center, 193 NLRB 959 (1971), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993) 23, 34, 35, 41

Sherewood Enterprises, 175 NLRB 354 (1969)..... 31, 33

Schnuck Markets, Inc. v. N.L.R.B., 961 F.2d 700 (CA8 1992)..... 22

Schnurmacher Nursing Home v. N.L.R.B., 214 F.3d 260 (CA2 2000)..... 6, 18, 30

Spentonbush/Red Star Co. v. N.L.R.B., 106 F.3d 484 (CA2 1997)..... 7, 22

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)..... 27

University Nursing Home, Inc., 168 NLRB 263 (1967)..... 34

Westwood Health Care Center, 330 NLRB No. 141, 2000 WL 309119 (Mar. 20, 2000) 25, 30, 40

Wing Memorial Hospital Ass'n, 217 NLRB 1015 (1975)..... 33, 35

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Administrative Procedure Act:

5 U.S.C. § 556(d) 7, 24

5 U.S.C. § 706(2)(A) 8

5 U.S.C. § 706(2)(E) 27

National Labor Relations Act, 29 U.S.C. § 151 et seq.:

Section 2(3), 29 U.S.C. § 152(3) 6, 25

Section 2(11), 29 U.S.C. § 152(11) ..... *passim*

Section 8(a)(1), 29 U.S.C. § 158(a)(1) 7, 22, 24

Section 8(a)(3), 29 U.S.C. § 158(a)(3) 7, 22, 24, 25

Section 8(a)(5), 29 U.S.C. § 158(a)(5) 7, 24, 25

Section 8(b)(3), 29 U.S.C. § 158(b)(3) 7

Section 8(d), 29 U.S.C. § 158(d) 7

Section 10(e), 29 U.S.C. § 160(e) 27

MISCELLANEOUS

93 Cong. Rec. 4677-78 (1947) 6, 15

MOTLEY, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB's NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711 (1998) 12, 17, 20, 29, 40

STATEMENT OF THE CASE

The Employer, Kentucky River Community Care, Inc. ("KRCC"), operates an eighty-bed residential treatment facility (Caney Creek) that provides care and psychiatric rehabilitation treatment to chronically mentally ill adults, with an emphasis on the development of independent living skills. J.A. 7. The facility operates twenty-four hours a day, seven days a week, and is divided into four units consisting of twenty residents per unit. J.A. 8, 16. Primary responsibility for the facility is vested in an administrator and an assistant administrator. J.A. 8. In addition, there are two unit coordinators, a nursing coordinator, a recreational counselor, a manager of housekeeping and maintenance, and a kitchen supervisor. J.A. 8; Pet. App. 45a.

There are approximately 110 professional and non-professional employees at Caney Creek, including six registered nurses ("RNs"), three licensed practical nurses ("LPNs"), 20 rehabilitation counselors, 40 rehabilitation assistants, three recreational assistants (for a total of 72 employees), and kitchen, dining room, housekeeping, and maintenance employees (an additional 38 employees). Employees are assigned to one of three shifts: first (7:00 a.m. to 3:30 p.m.); second (3:00 p.m. to 11:30 p.m.); or third (11:00 p.m. to 7:30 a.m.). J.A. 8, 16, 29, 35-36.

Caney Creek is required by contract with the State of Kentucky to have six RNs, and at least one RN is on each shift every day. J.A. 15-16. The 20 rehabilitation counselors, who have primary responsibility for developing treatment plans, generally work on the first shift. J.A. 11, 16. The 40 rehabilitation assistants, who function as direct

care staff and comprise the largest part of the manpower, are distributed over all three shifts. J.A. 12-13, 16. With the remaining employees also distributed over all three shifts, the first shift would include two RNs, one LPN, 20 rehabilitation counselors, approximately 13 rehabilitation assistants, one recreational assistant, and approximately 13 kitchen, dining room, housekeeping and maintenance employees, for a total of 48 to 50 employees. The second and third shifts would have a total of approximately 30 employees each, for a total of 110 employees.

The LPNs are supervised by and must comply with the directions of the RNs, particularly with respect to administering medication to residents and ensuring that proper documentation is done. J.A. 17-18, 29, 54. The RNs also direct the 40 rehabilitation assistants on how to deal with unusual situations that arise whenever a rehabilitation counselor is not present, *i.e.*, all times other than 7:00 a.m. to 3:30 p.m. Monday through Friday. J.A. 16. Also, whenever residents go on home visits or leave the building, the rehabilitation assistants must report their departure and return to the RN. J.A. 53; NLRB Transcript at 269-270. Whenever a resident starts acting up or appears out-of-sorts or feels ill, the rehabilitation assistant involved must report the situation directly to the RN on duty and follow the RN's instruction as to what action to take. J.A. 57, 58.

During the second and third shifts, throughout each weekend, on holidays, and in all emergencies, the RNs are designated Building Supervisors. This amounts to 75% of the total hours in a week. As Building Supervisors, the RNs are in charge of the entire facility and are the only persons on the premises charged with that

responsibility. J.A. 17, 29, 36. Additionally, whenever the administrator and treatment coordinators[1] are absent from the facility, the RNs assume the responsibility and authority of the Building Supervisor. J.A. 64. Through shift rotations, each RN serves as Building Supervisor at some point during the week. J.A. 16, 51. On some shifts there is only one RN Building Supervisor. J.A. 16.

The duties and responsibilities of the Building Supervisor have been set forth in three memoranda ("R/N-Building Supervisor Duties," "Procedure for Building Supervision," and a memorandum to all nurses dated August 23, 1996) which are kept in a Memoranda Notebook that every employee at the facility is required to read and initial indicating they indeed have read each of them. J.A. 48, 29, 62, 63, 64. These memoranda clearly communicate to all staff the fact that during the times when other Section 2(11) supervisors are not at the facility, the RN Building Supervisor has overall responsibility at the facility, and the staff are accountable and answerable to the Building Supervisor. J.A. 17, 27, 62. The Building Supervisor designation was created to centralize and coordinate building coverage, safety, and other activities. J.A. 17, 18. Building Supervisors are vested with the responsibility to oversee all coverage issues. J.A. 17.

Building Supervisors visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another. J.A. 18-19, 63; NLRB Transcript at 147. It is the Building

---

[1] The terms "treatment coordinator" and "unit coordinator" are used interchangeably. J.A. 61; Pet. App. 45a.

Supervisor's responsibility to make the judgment about whether additional coverage is needed and then transfer or move people from one unit to another to ensure coverage. NLRB Transcript at 147, 155. As the facility Administrator explained, "[y]ou need someone that really has – is looking at all the resources within the building, to see what's needed." J.A. 17. "[Y]ou needed someone who had ultimate responsibility, to have the authority – to act." J.A. 27. He testified that the Building Supervisors' primary responsibility is that of senior medical staff in the building at all times. They also are responsible for any kind of medical services and for overviewing the coverage in regard to basic safety as well as special activities or needs in the building. J.A. 16-17.

If a problem arises with a resident, the Building Supervisor can increase the staffing level. J.A. 24. Employees called in or asked to stay late by an RN get overtime pay. NLRB Transcript at 206. One rehabilitation assistant testified that he has been called in or asked to stay over by the RN "a lot." NLRB Transcript at 206, 334. Building Supervisors handle staff shortages when they arise by arranging coverage from the preceding shift and/or by calling off-duty employees. J.A. 36, 64. The Building Supervisors have the express authority to write up an employee who does not comply with a decision to shift that employee between units. J.A. 63. They also have authority to send an employee home whenever that employee engages in misconduct. The Building Supervisor exercises her independent judgment to determine if such action is warranted. J.A. 20-21. This authority

extends over all staff, including nursing staff, rehabilitation staff, and maintenance staff, provided that the Building Supervisor subsequently informs the employee's immediate supervisor. J.A. 20, 26. "[W]hatever's necessary can be carried out" by the Building Supervisor. J.A. 28.

SUMMARY OF ARGUMENT

I. The Board erroneously determined that the six RNs at Caney Creek who exercise professional judgment along with their own judgment are not supervisors under the Act.

To be a "supervisor," an individual must have authority, in the interest of the employer, to do any *one* of twelve statutory functions, provided that the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment. 29 U.S.C. § 152(11). The Board argues the RNs at issue in this case are not statutory supervisors because they do not use independent judgment when they responsibly direct other employees. That conclusion was purportedly reached applying the Board's interpretation of the term "independent judgment," *i.e.*, that an employee's exercise of professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment."

The Board's interpretation is irrational and inconsistent with the NLRA. The rule the Board follows creates a false dichotomy between the exercise of professional judgment and independent judgment and is an attempt to

revive the patient care analysis rejected by the Court in *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

The Board's interpretation also contravenes the Congressional purpose of including "responsibly to direct" in the definition of supervisor under the Act. In 1947, Congress amended the definition of "employee" in the NLRA to exclude "any individual employed as a supervisor," 29 U.S.C. § 152(3), and added a section defining the term "supervisor." *Id.* § 152(11). "Responsibly to direct" was added specifically to include as supervisors individuals who exercise professional judgment when directing other employees. 93 Cong. Rec. 4677-78 (1947); *Providence Hospital*, 320 NLRB 717, 727 (1996), enf'd, 121 F.3d 548 (CA9 1997).

The Board's interpretation also contravenes the Congressional purpose behind the supervisor exclusion. Congress excluded supervisors from the Act to restore the balance of power between employers and unions and to avoid conflicts of interest between management and rank-and-file employees. *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 682 (1980); *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 808-10 (1974).

The Board maintains that its interpretation properly accommodates the Act's coverage of professional employees, but in fact it will eliminate professionals as supervisors. *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000). Individuals who exercise supervisory authority granted by the employer responsibly to

direct employees fail the Board's test simply because they possess a professional degree and utilize those skills.

Moreover, the Board is not entitled to deference in interpreting the term "independent judgment" because the Board has a history of inconsistent rulings in supervisor cases and has manipulated the statute to accomplish its biased policy objectives. *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 160-61 (CA3 1999); *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 295 (CA4 1999); *Mid-America Care Foundation*, 148 F.3d 638, 642 (CA6 1998); *Spentonbush/Red Star Co. v. N.L.R.B.*, 106 F.3d 484, 492 (CA2 1997).

II. Pursuant to the Administrative Procedure Act, the Board has the burden of proving every element of a claim that an employer violated the NLRA. 5 U.S.C. § 556(d); *Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc.*, 512 U.S. 267, 279-81 (1994).

The Sixth Circuit below held that the Board was required to prove KRCC committed a Section 8(a)(5) violation when it refused to bargain with the Union. The Board should have the burden of proving that the unit represented by the Union is comprised solely of "employees." See 29 U.S.C. § 158(a)(5), (b)(3), (d). Putting the burden of proof on the Board in Section 8(a)(5) cases is consistent with the Board's burden of proving that an employer is liable for Section 8(a)(1) and 8(a)(3) unfair labor practices. Furthermore, the Board should have the burden of proof because it has failed to provide any meaningful guidance to employers.

III. The Board's conclusion that the six RNs at Caney Creek are not statutory supervisors is not supported by substantial evidence.

The Court of Appeals for the Sixth Circuit disagreed with the Board and found that the RNs are statutory supervisors and should have been excluded from the bargaining unit. Pet. App. 19a. The Sixth Circuit's decision should be affirmed because the substantial evidence on the record as a whole does not support the Board's conclusion.

There are numerous Board decisions in which the Board found comparable individuals to be supervisors under the Act. In this case, the Board improperly refused to credit probative evidence that RN Building Supervisors have authority responsibly to direct other employees and do so using independent judgment. If the RN Building Supervisors are not deemed supervisors, then the facility would be operating without *any* on-site or front-line supervision for 75% of the time the facility operates. Moreover, the workforce would be comprised of only 5% supervisors. Such results are both unreasonable and counter to the statute.

ARGUMENT

I. The Board's interpretation of "independent judgment" is irrational, arbitrary, and inconsistent with the Act.

Pursuant to the Administrative Procedure Act ("APA"), courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359,

377 (1998). Here the Board's interpretation of "independent judgment," as it relates to professionals who responsibly direct employees, is irrational, arbitrary, an abuse of discretion, and contrary to the text and purpose of the NLRA.

A. The Board's interpretation is a disguised attempt to revive the patient care analysis and creates a false dichotomy between professional judgment and independent judgment.

The Board attempts to revive the patient care analysis rejected by this Court in *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (hereinafter referred to as *"HCR"*), and its interpretation creates a false dichotomy between professional judgment and independent judgment.

HCR involved the Board's interpretation of the phrase "in the interest of the employer" in Section 2(11) of the NLRA. The Board took the position that a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients. *Id.* at 576. Rejecting that interpretation, the Court explained that the Board created a false dichotomy between patient care and the interest of the employer. *Id.* at 577-578. "That dichotomy makes no sense." *Id.* at 577.

In the health care context, nurses responsibly direct employees as to patient care; therefore, the distinction the Board makes between professional or technical judgment and independent judgment "is nothing more than an attempt to resurrect the Board's 'patient care' analysis." *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 168 (CA3 1999). Simply because the activity being supervised is

related to patient care cannot automatically mean the individual fails to qualify as a supervisor. *N.L.R.B. v. Beacon Light Christian*, 825 F.2d 1076, 1079 (CA6 1987).

The Board assumes irrationally and unreasonably that when a professional utilizes "professional or technical judgment" in the responsible direction of employees, that person is not using "independent judgment." The Board's interpretation improperly equates the exercise of professional judgment with the concept of "routine or clerical in nature." That interpretation is irrational and inconsistent with the Act. "[T]he use of independent judgment does not become 'merely routine' when exercised in the interest of patients." *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1553 (CA6 1992); *Integrated Health Serv. of Michigan v. N.L.R.B.*, 191 F.3d 703, 711-12 (CA6 1999) (finding that the Board relies on a false dichotomy "in contending that a nurse's supervisory acts are merely routine and do not involve independent judgment where the acts are informed by the nurse's training and experience as a nurse"). Such a false dichotomy between professional judgment when supervising patient care versus independent judgment when supervising in other ways makes no sense. "The essence of independent judgment is that the individual's actions are based on the thought processes of that individual, rather than on some outside force or person." *Nymed, Inc.*, 320 NLRB 806, 815 (1996) (Cohen dissenting).

The Board itself has recognized that such responsible direction *can* involve independent judgment:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise *her discretion* in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.

Avon Convalescent Center, Inc., 200 NLRB 702, 706 (1972) (emphasis added), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993). The Board's interpretation in the instant case is wrong. Instead, the focus should be on the discretion used by the RN in exercising overall authority and responsibility for other employees. "The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs." *Providence Hospital*, 320 NLRB 717, 737 (1996) (Cohen dissenting), enf'd, 121 F.3d 548 (CA9 1997). Such discretion is the essence of independent judgment and describes precisely the authority possessed by the Caney Creek RNs.

By assuming that exercising professional judgment is *always* routine, the Board ignores the well-recognized principle that the analysis of whether an individual is a supervisor is fact-specific.[2] See *HCR*, 511 U.S. 571, 586

---

[2] A determination of whether something is "routine" requires a case-by-case analysis to determine whether the individual who responsibly directs other employees is tightly constrained in his or her decision-making or exercises independent judgment. It should not matter if the source of that judgment is professional expertise. "If an individual's

(Ginsburg, J., dissenting) (emphasizing the Board's "case-by-case adjudication . . . to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their skilled work, a limited supervisory role"); *Integrated Health Serv. of Michigan v. N.L.R.B.*, 191 F.3d 703, 707 (CA6 1999) (explaining that "[t]he inquiry into supervisory status is 'fact-intensive' "); *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d at 163 ("Of course, resolution of the question whether a charge nurse exercises independent judgment is inherently factual in nature"); *Caremore, Inc. v. N.L.R.B.*, 129 F.3d 365, 370 (CA6 1997) (noting that the question of supervisory status under the Act predominantly involves a factually intense inquiry into the circumstances of each individual case).

At Caney Creek, "rarely anything . . . is routine, due to its environment, its employees, and the special needs of its residents." MOTLEY, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 739 (1998) (discussing nursing homes). A rehabilitation counselor testified at the Board hearing below that unexpected situations involving residents do occur. J.A. 57, 58. Problems with a resident may

---

discretion with respect to assignment, discipline, or the other statutory factors is tightly constrained, then her authority is 'routine' and does not involve 'independent judgment.' " *Beverly Enterprises-Pennsylvania, Inc. v. N.L.R.B.*, 129 F.3d 1269, 1270 (CADC 1997).

require temporary increases in staff. J.A. 24. If a complication occurs during a resident's home visit, the Building Supervisor makes a judgment call about sending staff to assist. NLRB Transcript at 208. Unexpected situations can occur with employees as well. J.A. 20, 21. If, in the judgment of the RN Building Supervisor, an employee has engaged in misconduct and must be sent home, she will have to re-direct the staff to maintain adequate coverage. J.A. 20. These scenarios demonstrate that exercise of judgment by RN Building Supervisors is not of a routine or clerical nature and is typical of supervisors irrespective of their professional training. Accordingly, they exercise independent judgment and are statutory supervisors.

B. The Board's interpretation frustrates the legislative intent behind both the phrase "responsibly to direct" and the Act's exclusion of supervisors.

The Board takes the position that this case is limited solely to the interpretation of "independent judgment" and disavows any argument that the term "responsibly to direct" is implicated in the analysis. See Brief for the NLRB at 21-22 n.9. That term is at issue because the rule as articulated by the Board applies when professionals are exercising professional judgment "in directing less-skilled employees to deliver services."

In *HCR*, the Court rejected the Board's interpretation of "in the interest of the employer" because it rendered portions of the statutory definition in Section 2(11) meaningless, specifically, the phrase "responsibly to direct."

HCR, 511 U.S. at 578-79. The Court, in rejecting the Board's test, stated:

> Under the Board's test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor. Only a nurse who in the course of employment uses independent judgment to engage in one of the activities related to another employee's *job status or pay* can qualify as a supervisor under the Board's test.

Id. at 579 (emphasis added). Such a result was unjustified. *Id.* Similarly, the Board's interpretation of "independent judgment" in the instant case suggests that only a nurse who performs, in the interest of the employer, functions other than responsibly directing employees, can qualify as a supervisor. This is contrary to the intent of the Act.

Analysis of the Act's legislative history demonstrates that inclusion of "responsibly to direct" in the definition of supervisor was intended to include as supervisors those individuals who exercise professional judgment when directing other employees. *Nymed, Inc.*, 320 NLRB 806, 815 (Cohen dissenting) (finding that Senator Flanders explicitly sought to include as supervisors those individuals who exercise "personal judgment based on personal experience, training, and ability").

Senator Flanders explained his reason for proposing "responsibly to direct" in the definition of "supervisor":

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to

> me to cover adequately everything except the basic act of supervising.
>
> * * *
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives the instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees" as enumerated in the report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting.
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men.

93 Cong. Rec. 4677-78 (1947). This language was accepted by Senator Taft and added to the definition of "supervisor." *Id.* at 4678.

An interpretation that denies supervisory status to RNs who use personal judgment responsibly to direct employees under them contravenes the intent of the statute as explicitly articulated by Senator Flanders. The Board has acknowledged that the addition of responsibly

to direct "was designed to include those individuals who exercised the essence of supervision without having the authority to exercise any other statutory indicium." *Providence Hospital*, 320 NLRB 717, 727 (1996), enf'd, 121 F.3d 548 (CA9 1997). That clear purpose is frustrated by the Board's conclusion that using professional judgment to direct others never involves the exercise of independent judgment.

The Board's interpretation also undermines the importance of loyal supervisors, particularly in a health care setting where the well-being of residents is paramount. Among the purposes of the legislation that placed supervisors outside the coverage of the NLRA were the restoration of a reasonable balance of power between employers and unions and avoidance of the conflicts of interest that may arise if an individual directing the work of union members on the job is herself a union member. *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1556 (CA6 1992). The exclusion of supervisors from the Act addressed the concern that "an employer is entitled to the undivided loyalty of its representatives." *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 682 (1980); see also *Florida Power & Light Co. v. International Brotherhood of Elec. Workers, Local 641*, 417 U.S. 790, 806-07 (1974). There is no exception for supervisors in the health care field, and the idea of creating such an exception was rejected at the committee level. *Beverly California Corp.*, 970 F.2d at 1552, citing S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974).

If the RN Building Supervisors are not found to be supervisors, disloyalty to management will jeopardize resident care. See *HCR*, 511 U.S. at 58-81 (rejecting the

Board's confidence that there is no danger of divided loyalty). The RN Building Supervisor, as the sole supervisor on site in the evenings, on the third shift, throughout the weekend, on all holidays, and in all emergencies, may be confronted with pressure from her union brothers and sisters.[3] Including RNs who are in charge of other employees in the same bargaining unit, especially ones who are in charge of an entire facility like the RNs at Caney Creek, significantly reduces the employer's ability to monitor interaction between employees and residents.

C. The Board's interpretation will eliminate professionals as supervisors.

As it did in *HCR*, the Board attempts to resolve a perceived tension between the Act's exclusion of supervisors and inclusion of professionals by distorting the statutory language. See *HCR*, 511 U.S. at 581. The Court can reconcile the distinction between professionals and supervisors without endorsing the Board's irrational and over-reaching interpretation.

---

[3] For example, if union members engaged in a slow-down of work, the supervisory nurse would likely be required to report the slow-down, which could result in discipline. If the supervisory nurse were a fellow union member, she may feel pressure not to report the action. MOTLEY, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 736-37 (1998). Another example is the possibility of favoritism and pressure that could be exercised by a union-member supervisor in giving extra duties to a nonunion member. *Id.* at 741.

The NLRB's interpretation will virtually eliminate professionals as supervisors. See *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000) (expressing concern that "many quintessentially supervisory employees will in the Board's view always be exercising authority that does not constitute responsible direction or the exercise of independent judgment because it is either 'routine' or 'based on superior training and skills' "); *Providence Alaska Medical Center v. N.L.R.B.*, 121 F.3d 548, 556 (CA9 1997) (Noonan, C.J., dissenting) (concluding that the Board's strained interpretation "in effect declares that a professional who is supervising other professionals[4] cannot be a supervisor"). In every case involving professionals who perform only the "responsibly to direct" component of Section 2(11), the Board will find that the individual's judgment "simply flowed from the nurses' professional knowledge and training." *Integrated Health Services of Michigan*, 191 F.3d at 711. The Board's explanation of its position in *Providence Hospital*, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (CA9 1997), reflects the improper result its interpretation will have:

> [T]he essence of professionalism requires the exercise of expert judgment and the essence of supervision requires the exercise of independent judgment. . . . [T]he alleged supervisory independent judgment of charge nurses when examined in detail becomes indistinguishable from the professional judgment exercised by all RNs.

Id. at 730. Accordingly, once the Board decides the RN is using her professional expertise in assigning and directing employees, it will conclude that she is not exercising independent judgment and is not a supervisor. This is an irrational conclusion.

Such an over-reaching result is endorsed by the American Nurses Association in its Amicus Brief. See Brief *Amicus Curiae* of American Nurses Association at 13 ("[T]he scope of any 'independent judgment' exercised by one member of the nursing staff in directing the work of another is so sharply constrained by these hospital-generated guidelines, that it is 'routine' within the meaning of § 2(11).") This result is irrational and inconsistent with the Act because it precludes nurses who responsibly direct other nurses from *ever* being supervisors.[5]

The dissent in *HCR* discussed the distinction between professionals who qualify as statutory supervisors and those who do not. Where professionals' "decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned," they are not supervisors. See *HCR*, 511 U.S. at 592 (Ginsburg, J.,

---

[4] It should be noted that the RN Building Supervisors at Caney Creek are supervising LPNs, rehabilitation assistants, and recreational assistants, all of whom are non-professionals. Pet. App. 55a (describing voting groups). The dynamic between professionals and non-professionals more strongly suggests a supervisor-employee relationship.

[5] At Caney Creek, the RN Building Supervisors are supervising rehabilitation and recreational staff in addition to nursing staff (LPNs). The professional training and expertise possessed by RNs is likely quite different from that of non-professional rehabilitation assistants and recreational assistants. Accordingly, the ANA's argument about nurses supervising nurses does not apply in this case.

dissenting). Likewise, where professionals do not possess "authority encompassing front-line management prerogatives," they are not supervisors. *Id.* at 590-91. On the other hand, if a professional's authority "flows from management and tends to identify or associate a worker with management," that worker is a supervisor. *Id.* at 592.

The RN Building Supervisors at Caney Creek have authority encompassing front-line management prerogatives. Management issued three Memoranda, which all employees were required to read and sign, making it clear the RNs were Building Supervisors. The authority possessed by the RNs flowed from management and identified them as part of management. They use personal judgment and discretion to carry out management directives related to personnel issues such as staffing, assigning, disciplining, and monitoring.[6] Being in charge of and accountable for the performance of employees is the type of management authority that historically has been determined to support supervisory status, even if exercising that authority involves some reliance on professional experience. For example, if an RN knows, based on professional training and experience, which employee

---

[6] In discussing the distinction between exercising expert judgment versus independent discretion, one commentator offered this example: "An example of such a distinction would be the 'professional' nurse who uses his or her discretion to complete the task of devising a patient-treatment plan, and the 'supervisory' nurse who administers the plan through the responsible direction and assignment of other employees." Motley, Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home, 73 Ind. L.J. 711, 730 (1998).

is best suited to assist when a safety concern arises and makes an assignment, she functions as a statutory supervisor when she acts on that knowledge.

By performing the appropriate case-by-case analysis, the courts and the Board can strike the appropriate balance between those professionals who are statutory supervisors and those who are not.

D. Deference to the Board is not required because the Board has engaged in blatant manipulation of the statute to further policy rather than following the text and intent of the statute.

The Union argues that deference to the Board's construction of the term "independent judgment" is mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Brief for the Union at 16.[7] *Chevron* deference is inappropriate because the NLRB has used arbitrary and manipulative means to achieve policy-directed results. See *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 160-61 (CA3 1999) (agreeing that a more probing review and less deference is warranted in Section 2(11) cases because the Board has mishandled the issue and manipulated the definition); *Beverly Enterprises, Virginia,*

---

[7] Interestingly, the Board does not rely upon *Chevron* in its Brief. Instead, the Board relies on two cases from the 1960s in which the Court simply recognized the Board's expertise in this area. Brief for the NLRB at 34. Neither the majority nor the dissenting Justices in *HCR*, 511 U.S. 571 (1994), raised the *Chevron* standard. See *Mid-America Care Foundation v. N.L.R.B.*, 148 F.3d 638, 643 n.4 (CA6 1998).

Inc. v. N.L.R.B., 165 F.3d 290, 295 (CA4 1999) ("In applying the definition of supervisor in 29 U.S.C. § 152(11), the Board has, we believe, manifested an irrational inconsistency."); *Mid-America Care Foundation v. N.L.R.B.*, 148 F.3d 638, 642 (CA6 1998) (concluding that *Chevron* deference is inappropriate when an agency's application of a statutory interpretation frustrates judicial review); *Spentonbush/Red Star Co. v. N.L.R.B.*, 106 F.3d 484, 492 (CA2 1997) ("the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area").

Even the Seventh and Eighth Circuit Courts of Appeals, which approve of the Board's interpretation of "independent judgment," agree that the Board is not entitled to the usual deference in supervisor cases. See *N.L.R.B. v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (CA7 1996) ("the NLRB's manipulation of the definition provided in [section 2(11)] has earned it little deference"); *Schnuck Markets, Inc. v. N.L.R.B.*, 961 F.2d 700, 704 (CA8 1992) (explaining that review of Board decisions "necessarily becomes more probing when the Board has exhibited a pattern of applying the statute inconsistently"); *Children's Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130, 132 (CA7 1989) (stating that "an administrative agency, like any other first-line tribunal, earns – or forfeits – deferential judicial review by its performance").

The Board's slant towards policy-driven outcomes is evident upon comparing the instant case to cases in which the Board seeks to establish employer liability through supervisors. In cases involving alleged unlawful threats, intimidation, or discrimination (Section 8(a)(1) and 8(a)(3) cases), the Board is more likely to conclude

based on facts similar to the instant case that an individual is a supervisor, because a finding of supervisory status renders the employer liable for an unfair labor practice. See *Great American Products*, 312 NLRB 962, 962 (1993) (finding employer liable for comments by a lead man because "he was held out by management as a supervisor and the employees working under his direction so viewed him"); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972) (concluding that employer was liable for conduct and statement of five nurses because those nurses were supervisors), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (concluding that employer was responsible for acts and conduct of eight RNs who served as "house supervisors" because the RNs were statutory supervisors by virtue of fact they "responsibly directed the work of the employees involved"), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993); *National Living Centers, Inc.*, 193 NLRB 638, 638-39, 641 (1971) (concluding that employer had knowledge of employee's union activity through nurse who was the night supervisor).

In *Clark & Wilkins Industries, Inc.*, 290 NLRB 106 (1988), aff'd, 887 F.2d 308 (CADC 1989), cert. denied, 495 U.S. 934 (1990), the Board concluded that a lead man was a supervisor by virtue of working with other employees, deciding when other employees worked on site and the work they performed, and authorizing changes in the work they are doing. Consequently, the lead man's knowledge of union activity was imputed to the employer. *Id.* at 109-10. Interestingly, the Board reached

that conclusion even though the parties stipulated to the lead man's eligibility to vote in the election. *Id.* at 107 n.2.

Despite the Board's acknowledgment that it "should use the same standard in unfair labor practice cases as in representation cases," *Providence Hospital*, 320 NLRB 717, 736 n.31 (1996), enf'd, 121 F.3d 548 (CA9 1997), the cases above and the instant case reveal its repeated failure to do so. Where the Board has displayed inconsistency and manipulation of the statute, "a close and thorough examination of the record is called for to ensure that the Board's findings are supported by substantial evidence and that its decision is not arbitrary and capricious." *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1046 (CA8 1998).

For these reasons, the Court should not defer to the Board's interpretation of the statute (as discussed above) or its factual determinations (as discussed in Part III).

II. The Board should have the burden of proving an individual is not a supervisor because the Board is the party alleging that an individual is an "employee" under the Act and entitled to protection of the Act.

Pursuant to the APA, the burden is on the Board to prove all the elements of a Section 8 claim, *i.e.*, that the employer interfered with, restrained, or coerced "employees" in the exercise of their rights, encouraged or discouraged membership in a labor organization by discriminating, or refused to bargain collectively with the employees' representative. 5 U.S.C. § 556(d); 29 U.S.C.

§ 158(a)(1), (3), (5); *Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc.*, 512 U.S. 267, 279-81 (1994).[8] On the other hand, employers have the right to discharge "supervisors" because of their involvement in union activities or union membership. *Florida Power & Light Co. v. International Brotherhood of Electric Workers, Local 641*, 417 U.S. 790, 808 (1974). They also have the right to refuse to engage in collective bargaining with "supervisors." *Id.* Consequently, proving that a particular individual is an "employee" is an element of the claim against the employer. Because the term "employee" is defined by the Act to exclude supervisors, see 29 U.S.C. § 152(3), the distinction between "employees" and "supervisors" is an element of the Board's case.

For example, where the Board alleges that an employer violated Section 8(a)(3) by discriminating against an individual because of his/her union activities, the Board should have the burden of proving that the individual is entitled to protection under the Act. Cf. *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *1 (Mar. 20, 2000) (finding that discharges of two individuals were not unlawful because the individuals were statutory supervisors). To be protected, the individual must be an employee and not a supervisor.

Similarly, in a Section 8(a)(5) case, the Board should have the burden of proving that the employer failed to bargain with an appropriate unit. To be appropriate, a bargaining unit must be made up of "employees" and no

---

[8] The instant case involves an allegation that KRCC violated Section 8(a)(5) by refusing to bargain with the Union.

"supervisors." This, therefore, is an element of the Board's case, and the Board should have the burden of proving it.

In addition, placing the burden of proof on the employer is inequitable because the Board has failed to provide sufficient guidance as to how the employer could meet its burden of proving supervisor status. The Board reaches inconsistent results and more often explains what a supervisor is *not* rather than what a supervisor *is*. See, e.g., *Providence Hospital*, 320 NLRB 717, 727, 729 (1996) (refusing to explain when "assignment" is made with independent judgment, and refusing to undertake an analysis of the meaning of "responsibly to direct"), enf'd, 121 F.3d 548 (CA9 1997).

Based on the above, the burden of proving supervisory status should be on the Board.

III. The evidence in the record as a whole demonstrates that the six RNs at Caney Creek are supervisors under the Act.

Whether or not the Court adopts the Board's interpretation of "independent judgment" and its allocation of the burden of proof, the Sixth Circuit's decision should be affirmed because substantial evidence proves that the six RN Building Supervisors are "supervisors" under the Act. The Board's erroneous conclusion is unsupported by substantial evidence on the record as a whole. *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 366 (1998); *Caremore, Inc. v. N.L.R.B.*, 129 F.3d 365, 369 (CA6 1997).

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951), citing *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

In *Universal Camera Corp.*, this Court made it clear that, pursuant to both the APA and the NLRA, reviewing courts are entitled, in fact required, to scrutinize decisions of the Board. 340 U.S. at 487, 489; 5 U.S.C. § 706(2)(E); 29 U.S.C. § 160(e). Congress has made it clear that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp.*, 340 U.S. at 488. "Congress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds." *Id.* at 490.

The Sixth Circuit below properly reviewed the record as a whole and concluded that the Board's decision was not supportable and not based on reasonable grounds. The court concluded that RN Building Supervisors exercise duties that are supervisory in nature:

> [they] direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments.

> These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses.

Pet. App. 18a-19a, reported at 193 F.3d 444, 454 (CA6 1999). Accordingly, the RNs are statutory supervisors and should not have been included in the bargaining unit. Pet. App. 19a.

A. The RN Building Supervisors exercise independent judgment beyond, as the Board terms it, "ordinary professional or technical judgment."

Even if the Board's interpretation is applied, substantial evidence does not support the conclusion that these RNs were simply exercising "ordinary professional or technical judgment." This Court has explained that "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 690 (1980). The substantial evidence on the record meets that requirement because other employees do not perform the activities of the RN Building Supervisor.

RNs at Caney Creek are the senior medical staff in the facility, have the responsibility to oversee all staff coverage issues, have authority to direct all staff throughout the facility when and where to work, can transfer employees and assign overtime, have ultimate responsibility for resident safety, must be informed whenever a resident leaves the facility, and make judgments about employee violations of personnel policies. They are not merely exercising professional judgment when they make

decisions on their own in these non-treatment areas.[9] "[W]hen an employer grants to an employee the authority to use judgment in the management or evaluation of other employees, that judgment is independent judgment under the NLRA, not the exercise of professional expertise." *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 295 (CA4 1999). "[T]he assignment of work, direction of nursing assistants, discipline of nursing assistants, and similar duties are not simply professional medical functions. Rather, such decisions are part and parcel of what it means to be a manager and a supervisor." *Id.* at 298.

---

[9] An important distinction between the instant case and cases rejecting nurses as statutory supervisors is that here we are not dealing with a fleet of nurses who simply treat patients. Cf. *Providence Alaska Medical Center v. N.L.R.B.*, 121 F.3d 548, 550-551, 554 (CA9 1997) (addressing supervisory status of 175 RNs serving as charge nurses and finding that they are "one of the gang with the RNs on their shift"). The Board must not be permitted to mischaracterize this case as a hospital case involving a large nursing staff. One commentator compared hospital settings to nursing home settings and concluded that the Board's approach ignores many of the differences between contested nurses in acute-need hospitals as opposed to contested nurses in long-term health facilities. He noted that the RN is usually the most disputed member of the proposed bargaining unit in the hospital setting, whereas the LPN is the most disputed member in the nursing-home setting. In nursing homes, the few RNs fill administrative and management roles. MOTLEY, NOTE, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 717-718 (1998). The author's analysis focused on LPNs serving as charge nurses, basically assuming that RNs in nursing homes are supervisors.

The authority and responsibilities granted to the RN Building Supervisors are part and parcel of what it means to be a manager or supervisor, and no other employee is given similar authority or responsibility. All staff at Caney Creek are informed that they are responsible and accountable to the RN Building Supervisor. J.A. 17, 62. This impresses upon employees that RNs are management's representatives with the authority "responsibly to direct" them. See *Schnurmacher Nursing Home. v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000) (stating that "where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised").

In cases involving management structures identical to the one at Caney Creek, the parties stipulated that RNs filling similar roles to the RNs in this case were statutory supervisors. See, e.g., *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 263 (CA2 2000) (parties agreed that seven "nurse managers" were statutory supervisors); *N.L.R.B. v. Grancare, Inc.*, 170 F.3d 662, 664 (CA7 1999) (parties agreed that 19 RNs were supervisors under the Act but disagreed as to LPNs "who lie betwixt and between lowly CNAs and lofty RNs"); *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *15 n.4 (Mar. 20, 2000) (noting that "the Regional Director for Region 18 clarified the unit at the Bryn Mawr facility . . . to exclude from the bargaining unit the p.m., night, and weekend building supervisors on the ground that they were statutory supervisors"); *North Dade Hospital, Inc.*, 210 NLRB 588, 592 (1974) (noting that the parties stipulated that the nursing supervisors on each shift were statutory supervisors, and that the second and third shift

nurses were in charge of the entire hospital operation due to the absence of administrative personnel); *Sherewood Enterprises*, 175 NLRB 354, 354 n.2 (1969) (noting that parties had not sought review of Regional Director's decision that five registered nurses – the director of nursing, the day shift supervisor, the P.M. shift supervisor, the night shift supervisor, and the central supply supervisor – were statutory supervisors).

Similarly, in the *Nymed* case, where the Board first articulated its post-*HCR* interpretation of "independent judgment," individuals comparable to the RNs in this case were deemed supervisors. In *Nymed, Inc.*, 320 NLRB 806 (1996), the Board stated at the outset that there were two RN nursing supervisors on the day shift *in addition to* the director of nursing, assistant director of nursing, and unit managers. On the evening and night shifts, no unit manager was on duty but there were two RN nursing supervisors on each shift. *Id.* at 807. The Board made the following factual findings as to these RN supervisors:

> [T]hese RNs make clinical rounds of the patients, check on those patients who are ill, and consult LPNs as to the condition of patients on their units. They also give medical advice to LPNs when needed and deal with medical emergencies . . . In addition, their duties include checking to be sure there is adequate staff present, and if not, calling personnel assigned to the next shift to see if they can come in early.

Id.

In *Newton-Wellesley Hospital*, 219 NLRB 699 (1975), the Board concluded that 11 nurse leaders were statutory

supervisors.[10] Nine of the 11 were employed on the day shift and served as head of one of the various patient care units the hospital maintained. *Id.* at 700. The remaining two functioned as evening shift supervisor and night shift supervisor respectively, and the Board noted that they "are frequently the only individuals appearing to possess any supervisory attributes in the nursing services division who are *physically present*, as a matter, during their respective shifts." *Id.* (emphasis added). Based on those facts, the Board concluded that those 11 nurse leaders were statutory supervisors:

> Supervisors or nurse leaders on the day shift are directly responsible for the direction of the work activities of the employees assigned to the respective unit which each heads. In performing these responsibilities, they make the kind of decisions reflecting the "exercise of professional judgment" not only affecting the care of patients but also affecting the employment conditions of the employees involved and which are therefore of a type properly to be described as reflecting the exercise of supervisory authority within the meaning of the Act.

---

[10] The Board also concluded that nine assistant supervisors "who are employed on the night shift and evening shifts have responsibilities comparable to those of the supervisors on the day shift. As noted, there is only one supervisor on each of these shifts. . . . Accordingly, each such supervisor relies heavily on assistant supervisors." *Newton-Wellesley Hospital*, 219 NLRB at 700. The Board recognized two levels of statutory supervisors on the night and evening shifts. In the instant case, the Board refused to recognize even one level of supervisors.

Id. at 700. Even though "professional judgment" was used, it was used to manage employees, and they were found to be statutory supervisors.

In *Wing Memorial Hospital Ass'n*, 217 NLRB 1015 (1975), the employer contended that shift supervisors should be excluded from the bargaining unit as "supervisors," and the Board agreed. Six RNs served as shift supervisors at least two days per week. As shift supervisors, they were "in complete charge of all nursing personnel working on a particular shift" in a particular section of the hospital. *Id.* at 1015. They "must make daily adjustments in scheduling. They also authorize overtime, call in nurses who are off duty, and make transfers from one section to another." *Id.* Acknowledging that the use of professional judgment is not always the same as supervisory authority,[11] the Board nevertheless held that, "[a]lthough the shift supervisors herein may give some direction to other nursing personnel 'in the exercise of professional judgment,' the traditional standards for determining supervisory status remain applicable to the RNs." *Id.* at 1015-16; see also *Sherewood Enterprises*, 175 NLRB 354, 354 (1969) (holding that "floor head nurses" were statutory supervisors where, "[o]n duty in each

---

[11] Before addressing the supervisory status of the RN shift supervisors, the Board specifically referred to the Senate Committee report relied on by the Union in its Brief. *Wing Memorial Hospital Ass'n*, 217 NLRB at 1015-16 & n.10, citing S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974); see also Brief for the Union at 35. This Court explicitly rejected the Board's reliance on that Committee Report in *HCR*, 511 U.S. at 582, which may explain why the Board does not rely upon it in this case.

wing on each shift is a registered nurse who has the title 'floor head nurse' and, under her, as many as eight licensed vocational nurses and nurses' aides"); *University Nursing Home, Inc.*, 168 NLRB 263, 265 (1967) (excluding one LPN from the unit because she supervised the work of three nurses' aides and one orderly).

In *National Living Centers, Inc.*, 193 NLRB 638 (1971), the Board held that an LVN was a statutory supervisor because she served as the night shift supervisor. In that role, she was in charge of the entire building, she distributed work to nurses' aides, and employees had to see her to clear leaving early and arriving late. *Id.* at 638-39. The Board particularly noted that the "circumstances are clearly calculated and designed to impress employees with the fact that [the LVN] is their boss." *Id.* at 639.

Similarly, in *Rockville Nursing Center*, 193 NLRB 959 (1971), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993), the Board concluded that eight RNs were supervisors under the Act because they all functioned at times as the "house supervisor" or "building supervisor."

> The facts as a whole reveal that thereafter the lone registered nurse on each shift was a "house supervisor." The "house supervisor" was in charge (during the shift to which he or she was assigned) of all nursing stations in operation. The responsibility of the "house supervisor" was to supervise the nursing area given the patients by the staff during the "house supervisor's" tour of duty. The "house supervisor's" responsibility included seeing that employees assigned to the shift were present, and if such personnel were not present, to call in other personnel. . . . The facts are clear that licensed practical nurses and some other employees reported to the house supervisors for instructions, and received instructions from such supervisors.

Id. at 962.

Like the RNs in *Nymed*, the nurse leaders in *Newton-Wellesley Hospital*, the shift supervisors in *Wing Memorial Hospital*, the LVN in *National Living Centers*, and the RNs in *Rockville Nursing Center*, the RN Building Supervisors at Caney Creek qualify as statutory supervisors. RNs are the senior medical staff in the building at all times and are responsible for quality resident care. J.A. 16-17, 62. As Building Supervisors, RNs supervise the second and third shifts on Monday through Friday and every shift on the weekends, on all holidays, and in all emergencies. J.A. 17, 29, 36. This constitutes 75% of the time the facility operates. At those times, no other supervisor is on site, and the RN Building Supervisors are in charge of the entire facility. J.A. 29, 36.

RN Building Supervisors visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another. J.A. 18-19, 63; NLRB Transcript at 147, 155. They are responsible for overseeing all safety and resident issues that occur. J.A. 17. If a problem arises with a resident or in the case of weather emergencies, the Building Supervisors can increase the staffing level by arranging coverage from the preceding shift and/or by calling off-duty employees. J.A. 24, 36, 64. The Building Supervisors have authority to write up employees who do not comply with a decision to shift that employee between units. J.A. 63. They also have authority to send an employee home whenever that

employee engages in misconduct. J.A. 20-21. They supervise LPNs regarding resident medication, and they consult with rehabilitation assistants concerning resident care and absence from the building. J.A. 16, 17-18, 53, 54, 57, 58. Employees are instructed to and do seek out the RNs for assistance with residents. J.A. 57, 58.

Based on comparable factual scenarios and the substantial evidence on the record as a whole, the Court should affirm the Sixth Circuit's conclusion that the RNs at Caney Creek are statutory supervisors and excluded from the bargaining unit.

B. If the RNs are not supervisors, then an entire staff and all its patients have no on-site supervision, and the ratio of supervisors to employees is unreasonable.

In addition to the specific authority and responsibilities vested in the RN Building Supervisors, the absence of any *other* on-site supervisors should be a significant factor in the analysis of their status as a supervisor. A psychiatric rehabilitation program, like a nursing home, cannot be well-run if there is no on-site supervision. *N.L.R.B. v. Beacon Light Christian*, 825 F.2d 1076, 1080 (CA6 1987); see also *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (concluding that 20 charge nurses are statutory supervisors in part because "if we were to find that the charge nurses are not supervisors, employees at the Employer's facility would be without on-site supervision during nights and weekends"); *National Living Centers, Inc.*, 193 NLRB 638, 639 (1971) (emphasizing that if LVN working night shift is not a supervisor, "then one

must conclude that the entire nursing home and its many patients are left without any direct supervision during the night hours, and this is not the case"); *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 298 (CA4 1999) (rejecting Board's conclusion because "[i]t strains credulity to imagine that for two-thirds of the operating time of the nursing home, no judgments other than routine and clerical judgments are made to keep the home operating"). Agreeing with the Board in the instant case would mean concluding that no judgments other than routine and clerical judgments are made for three-fourths of the time at the Caney Creek facility, an even more incredulous conclusion.

In *Providence Hospital*, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (CA9 1997) the presence of stipulated RN statutory supervisors was an important factor in the Board's conclusion that charge nurses were *not* statutory supervisors. *Id.* at 717.

> The centers that employ the disputed charge nurses . . . uniformly also employ supervisory RNs. The supervisory RNs, with the exception of the emergency services center, serve as charge nurses when they are present and actively involved in patient care. The presence of supervisory RNs limits the times when RN charge nurses are "in charge."

Id. at 730.

There are approximately 110 employees at Caney Creek, including six RNs (at issue here), three LPNs, 20 rehabilitation counselors, 40 rehabilitation assistants, three recreational assistants, and kitchen, dining room, housekeeping, and maintenance employees. J.A. 8, 29.

The Sixth Circuit and the Board agreed that the 20 rehabilitation counselors are not supervisors. Pet. App. 19a. The only individuals recognized by the Board as statutory supervisors are two administrators, two department managers, the nursing coordinator, a recreational counselor, and two unit coordinators. Pet. App. 45a. These eight "senior staff" members work only 7:30 a.m. to 5:00 or 6:00 p.m. J.A. 29, 36. Consequently, for most of the second shift, all of the third shift, throughout the weekend, and all holidays there would be no supervisor on duty if the RNs are not supervisors. A conclusion that there is no on-site supervision for approximately 70% of the time the facility operates is unreasonable.

Similar to the need for on-site supervision, the overall ratio of supervisors to non-supervisory employees must be rational and consistent with appropriate business standards. See *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1555 (CA6 1992) (finding that a ratio of one supervisor to 27 employees raises a warning flag); *N.L.R.B. v. Grancare, Inc.*, 170 F.3d 662, 666 (CA7 1999) (reiterating that its first "guiding light" in analyzing Board's determination of supervisor status "is the ratio of supervisor to nonsupervisory employees under the competing positions of the parties," and accepting a workforce with 14% supervisors); *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1047 (CA8 1998) ("The ratio of supervisors to non-supervisory employees is often significant in determining whether an employee has supervisory status.").

The Board concluded that rehabilitation counselors were not supervisors in part because a ratio of 20 supervisors for 40 employees "is totally unrealistic and militates against finding the rehabilitation counselors to be supervisors." Pet. App. 49a.

Finding that the RNs are not supervisors renders a totally unrealistic result in the opposite direction. The first shift is comprised of two RNs, one LPN, 20 rehabilitation counselors, approximately 13 rehabilitation assistants, one recreational assistant, and approximately 13 kitchen, dining room, housekeeping and maintenance employees, for a total of 48 employees. That leaves about 30 employees on each of the second and third shifts. Under the Board's analysis, for 110 total employees, there would be only six supervisors (two unit coordinators, a nursing coordinator, a recreational counselor, a manager of housekeeping and maintenance, and a kitchen supervisor). This results in 5% supervisors, all of whom work only on the day shift. Adding six RNs, as KRCC proposes, results in 12 supervisors for 104 employees, or 12% supervisors. Twelve percent is a much more reasonable result.

Focusing on the second and third shifts further demonstrates that RNs are statutory supervisors. There are approximately 30 employees on the second and third shifts, respectively. If the RNs are statutory supervisors, there would be at most two on-site supervisors for 28 employees, or 7%. Even if the one "on-call" supervisor is added, there would be three supervisors for 28 employees, or 11%.

The Board disregarded the absence of on-site supervision and the supervisor-to-employee ratios, thereby ignoring key substantial evidence opposed to its conclusion. Upon consideration of that evidence, the Court should find that the RNs are supervisors.

C. The Board improperly refused to recognize the authority granted to the RNs by management.

The Board's finding that the Caney Creek RNs are not statutory supervisors when they serve as Building Supervisors "rests on a refusal to credit probative evidence." *Allentown Mack Sales & Service, Inc.*, 522 U.S. at 268. Specifically, the Board improperly disregarded the authority bestowed upon Building Supervisors in the three Memoranda. Pet. App. 51a. Job descriptions and similar documents are persuasive evidence of supervisory authority. See MOTLEY, supra, at 720-21. It is the existence of authority that counts under the statute, and not the frequency of its exercise. *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1550 n.3 (CA6 1992), citing *N.L.R.B. v. Medina County Publications, Inc.*, 735 F.2d 199, 201 (CA6 1984); see also *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *5 (March 20, 2000) (noting that the administrative law judge found that "it is the possession of supervisory power rather than its exercise that determines supervisory status"); *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (explaining that its conclusion that charge nurses are supervisors "is buttressed by the fact that charge nurses' written job description encompasses daily supervision of aides and orderlies"); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972) (explaining that "[a]ny question of the power

of [the five nurses] responsibly to direct other employees and to assign them – substantively, and not routinely – is convincingly answered by the Respondent's Policies, Rules and Regulations for Non-Professional Personnel"), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993).

There is no logical reason to disregard the three Memoranda describing RN Building Supervisors' authority and responsibilities, because employers have a disincentive to grant supervisory authority to an individual if the individual cannot actually exercise that authority. For example, in the context of unfair labor practice cases, employers are liable for unlawful statements and conduct by their supervisors. See *Avon Convalescent Center, Inc.*, 200 NLRB at 706 (concluding that employer was liable for conduct and statement of five nurses because those nurses were supervisors); *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (concluding that employer was responsible for acts and conduct of eight RNs because the RNs were supervisors), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993).

Likewise, in cases involving sexual harassment, this Court has held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 745 (1998).

The substantial evidence on the record as a whole supports the Sixth Circuit's conclusion that the six RNs at Caney Creek are supervisors. The RNs responsibly direct

an entire staff and are accountable for building operations for more than 75% of the week. Their authority responsibly to direct employees flows from management and requires the use of independent judgment.

CONCLUSION

The Court should affirm the Sixth Circuit's decision that the RNs at Caney Creek are statutory supervisors and, therefore, properly excluded from the bargaining unit.

Respectfully submitted,

MICHAEL W. HAWKINS
LOUISE S. BROCK
CHERYL E. BRUNER
DINSMORE & SHOHL LLP

December 2000

Supreme Court, U.S.
FILED
JAN 19 2001

JAN 19 2001

No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LEONARD R. PAGE
Acting General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

Cases: Page

Avon Convalescent Center, Inc., 200 N.L.R.B. 702 (1972), enforced, 490 F.2d 1384 (6th Cir. 1974) 3

Ballou Brick Co., 277 N.L.R.B. 41 (1985), enforcement denied in part, 798 F.2d 339 (8th Cir. 1986) 8

Beverly Enters.—Ohio, 313 N.L.R.B. 491 (1993) 3, 18, 19, 20

Beverly Enters., Va., Inc. v. *NLRB*, 165 F.3d 290 (4th Cir. 1999) (en banc) 4

Capital Transit Co., 114 N.L.R.B. 617 (1955) 17

Carlisle Engineered Products, Inc., 330 N.L.R.B. No. 189, 2000 WL 569474 (Apr. 28, 2000) 5

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 10

Clark & Wilkins Indus., Inc., 290 N.L.R.B. 106 (1988), aff'd, 887 F.2d 308 (D.C. Cir. 1989), cert. denied, 495 U.S. 934 (1990) 11

DST Indus., Inc., 310 N.L.R.B. 957 (1993) 17

Director, Office of Workers' Comp. Programs v. *Greenwich Collieries*, 512 U.S. 267 (1994) 13-14

Elmhurst Extended Care Facilities, Inc., 329 N.L.R.B. No. 55, 1999 WL 801516 (Sept. 30, 1999) 5

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 13

Gem Urethane Corp., 284 N.L.R.B. 1349 (1987) 8

Great American Products, 312 N.L.R.B. 962 (1993) 11

Health Care & Retirement Corp., 328 N.L.R.B. No. 156, 1999 WL 562096 (July 27, 1999) 6

Illinois Veterans Home at Anna L.P., 323 N.L.R.B. 890 (1997) 5

Legal Aid Soc'y of Alameda County, 324 N.L.R.B. 796 (1997) 6

Loyalhanna Health Care Assocs., 332 N.L.R.B. No. 86, 2000 WL 1670884 (Oct. 30, 2000) 4

MDI Commercial Servs., 325 N.L.R.B. 53 (1997) 18

Cases—Continued: Page

NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 10
NLRB v. *Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999) 19
NLRB v. *Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) 2, 10
NLRB v. *Town & Country Elec., Inc.*, 516 U.S. 85 (1995) 12, 13
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) 13
NLRB v. *Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) 10
National Living Ctrs., Inc., 193 N.L.R.B. 638 (1971), enforced, 462 F.2d 575 (5th Cir. 1972) 11, 19
New York Univ. Med. Ctr. v. *NLRB*, 156 F.3d 405 (2d Cir. 1998) 12, 14
Newton-Wellesley Hosp., 219 N.L.R.B. 699 (1975) 19
Nymed, Inc., 320 N.L.R.B. 806 (1996) 19
Oil Workers Int'l Union v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1971), cert. denied, 404 U.S. 1039 (1972) 17
Packard Motor Car Co., 61 N.L.R.B. 4, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947) 9
Pittsburgh Plate Glass Co. v. *NLRB*, 313 U.S. 146 (1941) 14
Providence Hosp., 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997) 5, 6, 7
Schnurmacher Nursing Home v. *NLRB*, 214 F.3d 260 (2d Cir. 2000) 19
Sherewood Enters., Inc., 175 N.L.R.B. 354 (1969) 19
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 13
Tree-Free Fiber Co., 328 N.L.R.B. No. 51, 1999 WL 305507 (May 10, 1999) 5
Utica Mut. Ins. Co. v. *Vincent*, 375 F.2d 129 (2d Cir.), cert. denied, 389 U.S. 839 (1967) 15

Cases—Continued: Page

Vencor Hosp.-Los Angeles, 328 N.L.R.B. No. 167, 1999 WL 606678 (Aug. 5, 1999) 4
Venture Indus., Inc., 327 N.L.R.B. No. 165, 1999 WL 161049 (Mar. 19, 1999) 8
WBAI Pacifica Found., 328 N.L.R.B. No. 179, 1999 WL 676522 (Aug. 26, 1999) 12
Westwood Health Care Ctr., 330 N.L.R.B. No. 141, 2000 WL 309119 (Mar. 20, 2000) 7-8
Wing Mem'l Hosp. Ass'n, 217 N.L.R.B. 1015 (1975) 19

Statutes:

Act of July 5, 1935 (Wagner Act), Ch. 372, 49 Stat. 449 9
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 6, 9, 12, 13, 14
§ 2(3), 29 U.S.C. 152(3) 12, 13
§ 2(11), 29 U.S.C. 152(11) ..... *passim*
§ 2(12), 29 U.S.C. 152(12) 7
§ 2(12)(a)(ii), 29 U.S.C. 152(12)(a)(ii) 6, 7
§ 8(a), 29 U.S.C. 158(a) 11, 13

Miscellaneous:

American Heritage Dictionary of the English Language (3d ed. 1992) 12
93 Cong. Rec. 4677-4678 (1947) 9
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 6-7
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 7, 9, 10

In the Supreme Court of the United States

No. 99-1815

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

1. The principal issue in this case is the reasonableness of the interpretation that the National Labor Relations Board (NLRB or Board) has given the phrase "independent judgment" in Section 2(11) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(11). As we explain in our opening brief, under the Board's interpretation, an employee does not exercise "independent judgment" that triggers supervisory status under Section 2(11) when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. NLRB Br. 11. The Board has applied that analysis over many years to both professional and non-professional employees in various employment contexts. *Id.* at 16-20. And, since this Court's decision in

NLRB v. *Health Care & Retirement Corp. of America* (*HCR*), 511 U.S. 571 (1994), the Board has applied the traditional analysis in the health care field. NLRB Br. 21.

Respondent's primary contentions are that the Board's interpretation of "independent judgment" creates a false dichotomy between professional judgment and independent judgment (Br. 9-13), eliminates professionals as supervisors (Br. 17-21), and precludes supervisory status based on responsible direction of other employees (Br. 13-16). There is no merit to any of those contentions, all of which rest on an inaccurate characterization of the Board's interpretation.[1]

a. Respondent erroneously asserts (Br. 10) that, under the Board's interpretation, "when a professional utilizes 'professional or technical judgment' in the responsible direction of employees, that person is not using 'independent judgment.'" Respondent thus asserts that, in the Board's view, the exercise of "professional judgment" is "*always* routine" (Br. 11) and "never involves the exercise of independent judgment" (Br. 16). Contrary to those assertions, the Board does not take the view that an employee who uses professional or technical judgment in performing one of the supervisory duties specified in Section 2(11) cannot also be exercising "independent judgment." Indeed, in our opening brief, we identify several cases in which the Board found that professional or technical employees exercised "independent judgment." NLRB Br. 19 n.7.

[1] Respondent also incorrectly asserts (Br. 9) that the Board's interpretation is "a disguised attempt to revive the patient care analysis" that this Court rejected in *HCR*. As we have explained above, the Board's interpretation is its long-standing, traditional analysis, which it applies in all employment contexts and to all types of employees, not just in the health care field or to nurses. Further, as we explain below, the Board's interpretation turns on the extent of discretion exercised by the employee whose supervisory status is in question, not on the purpose for which he exercises that discretion.

As we have explained, the Board has long held that whether an employee is a supervisor depends on the *degree* of judgment or discretion exercised by the employee in the performance of any supervisory duty specified in Section 2(11). When an employee, based on professional or technical skill or experience, exercises limited discretion to direct others in accordance with employer-specified standards (as expressed in blue-prints, established work procedures, and the like), the Board has found that the employee does not exercise "independent judgment" that triggers supervisory status. If, however, an employee exercises significant discretion to direct others within only general confines, the Board has found that the employee exercises "independent judgment" under Section 2(11). See NLRB Br. 16-21 & nn. 5-8. In short, the Board's interpretation recognizes that an employee's exercise of professional or technical judgment may also entail the exercise of "independent judgment" if the employee's judgment is not significantly constrained by external sources. The constraints may flow from a variety of sources, including written employer standards and established professional or technical routines or work procedures, but whether the employee exercises "independent judgment" turns on the extent of his discretion.[2]

Amicus Society for Human Resource Management (SHRM) acknowledges (Br. 19 n.30) that "an employer may, in certain instances, so hamstring the exercise of a would-be

[2] Respondent suggests (Br. 10-11) that the Board's interpretation is inconsistent with *Avon Convalescent Center, Inc.*, 200 N.L.R.B. 702 (1972), enforced, 490 F.2d 1384 (6th Cir. 1974), but that case has no precedential value. Even at the time it was decided, which was during the period when the Board was applying the "in the interest of the employer" test for determining the supervisory status of nurses that this Court rejected in *HCR*, *Avon* was not in accord with the run of the Board's decisions in the health-care field. For that reason, *Avon* was subsequently overruled. See *Beverly Enters.—Ohio*, 313 N.L.R.B. 491, 494 n.12 (1993).

supervisor's judgment so as to prevent the exercise of 'independent' judgment," but contends that "the facts of this case do not demonstrate any 'employer-specified standards' that so constrained the exercise of supervisory judgment." If, by "hamstring," SHRM means impose limitations so strict as to leave the employee no room for thought (see *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 303 (4th Cir. 1999) (en banc) (Phillips, J., dissenting)), we agree that respondent did not confine the judgment of the registered nurses (RNs) in this case to *that* extent. The Board, however, has properly rejected the view that an employee is a supervisor whenever he exercises some judgment in directing other employees, because that view is not supported by the language or purpose of the Act. See NLRB Br. 22-32. The relevant inquiry under the Board's interpretation of "independent judgment" is the degree to which the employee's judgment is limited, and the facts of this case show that respondent significantly restricted the RNs' discretion. See *id.* at 42-45.

SHRM is also mistaken in contending (Br. 19 n.30) that the Board has, in practice, applied its interpretation to find that nurses do not exercise "independent judgment" even absent external constraints on their discretion. In the cases cited by SHRM (*ibid.*) in support of that contention, the discretion of the employees at issue was in fact limited by external constraints, such as employer standards, patient care plans, and professional routines.[3] Other cases since

[3] See *Loyalhanna Health Care Assocs.*, 332 N.L.R.B. No. 86, 2000 WL 1670884, *3 (Oct. 30, 2000) (nurses oversaw work of aides involving "routine aspects of patient care" pursuant to "rules and regulations governing long-term care facilities" and patient "care plans"); *Vencor Hosp.-Los Angeles*, 328 N.L.R.B. No. 167, 1999 WL 606678, *2, *5 (Aug. 5, 1999) (nurses exercised only "limited" assignment authority because assignments were based on patient needs as reflected in the "patient's plan of care" and "dictated by which team member has the obvious required skill"; nurses gave directions regarding only "simple tasks" or the "proper method" for performing recurring procedures); *Providence Hosp.*, 320 N.L.R.B. 717, 730-733 (1996) (charge nurses' "limited authority" to assign other RNs was constrained by monthly schedules, the need to "check with the shift coordinator," and reliance on the practice of asking for volunteers and using "rotational lists"; their monitoring of the work of other RNs and intervention in "acute situation[s]" was required by "state practices" and was a "routine function * * * shared by all RNs"), enforced, 121 F.3d 548 (9th Cir. 1997). *Elmhurst Extended Care Facilities, Inc.*, 329 N.L.R.B. No. 55, 1999 WL 801516, *3-*4 (Sept. 30, 1999), addressed the different issue whether nurses who filled out evaluation forms concerning aides "effectively recommend[ed]" their retention or reward.

HCR in which the Board has found employees not to be supervisors have involved similar constraints.[4]

b. A proper understanding of the Board's interpretation of "independent judgment" reveals that there is no basis for respondent's assertion (Br. 18) that the interpretation "will virtually eliminate professionals as supervisors." Under the Board's interpretation, a nurse or other professional (just like any other employee) may be found to be a supervisor if she performs one of the listed supervisory functions with sufficient discretion to constitute independent judgment.

[4] See, *e.g.*, *Carlisle Engineered Products, Inc.*, 330 N.L.R.B. No. 189, 2000 WL 569474, *1 (Apr. 28, 2000) (processors did not exercise "independent judgment" in assigning work and directing operators to change duties because directions were "based on commonsense efficiency and job priorities set by the Employer"); *Tree-Free Fiber Co.*, 328 N.L.R.B. No. 51, 1999 WL 305507, *7 (May 10, 1999) (team leader's assigning and prioritizing work for team members was not "marked by independent judgment" but entailed "routine responses to predictable, recurring work-assignment issues"); *Illinois Veterans Home at Anna L.P.*, 323 N.L.R.B. 890, 891 (1997) (nurses do not exercise "independent judgment" in assigning and directing aides when "generally [aides] are assigned to the halls where they previously had been working to provide continuity in care," the tasks performed "are set by a worksheet setting forth the care plan for each resident," and, "[i]f any special tasks arise during a shift, * * * the [nurse] will direct whoever is available to perform the task").

See, *e.g.*, *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156, 1999 WL 562096, *2 (July 27, 1999) (nurses found to be supervisors because they "exercise independent judgment when disciplining [aides], for example, by determining what category to classify a given infraction of the Employer's rules and to take the appropriate action"); *Legal Aid Soc'y of Alameda County*, 324 N.L.R.B. 796, 796 (1997) (attorney found to be supervisor because she possessed independent "authority to evaluate and effectively recommend retention and termination of the paralegals in her unit").

Although the Board's approach does not eliminate professionals as supervisors, the approach advocated by respondent would exclude most professional employees from the rights and protections of the Act. Respondent contends (Br. 11) that a "professional['s] exercise[] [of] discretion and judgment" (which is inherent in his status as a professional under the Act, 29 U.S.C. 152(12)(a)(ii)) "is the essence of independent judgment." Thus, in respondent's view, professionals exercise Section 2(11) "independent judgment" whenever they assign or direct other employees. See also Resp. Br. 20 & n.6. If, as respondent contends, a professional necessarily exercises "independent judgment" whenever he gives *any* direction to less-skilled employees, then the Act's express coverage of professionals would effectively be nullified because most professionals work with assistants.[5] As we have explained (NLRB Br. 32-33), when Congress decided to cover professional employees, it was aware that most of them routinely work with assistants. H.R. Conf. Rep. No.

[5] Moreover, the notion that *all* assignment and direction *necessarily* involves independent judgment is inconsistent with the realities of the workplace. See, *e.g.*, *Providence Hosp.*, 320 N.L.R.B. at 732 (noting that "[i]t does not require much judgment to decide that, if there is one aide, the aide covers the entire unit, or if there are two aides, the unit is split between them").

510, 80th Cong., 1st Sess. 36 (1947). Congress therefore could not have intended that this fact would suffice to prevent the coverage of "professional groups such as * * * nurses" provided for in Section 2(12). S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947).

c. Respondent also errs in contending (Br. 14) that the Board's interpretation of "independent judgment" renders meaningless Section 2(11)'s provision that an employee may be a supervisor by virtue of his authority "responsibly to direct" other employees. Contrary to respondent's contention, nothing about the Board's interpretation dictates that "only a nurse who performs * * * functions other than responsibly directing employees, can qualify as a supervisor." *Ibid.* Indeed, because the "independent judgment" requirement (and the Board's interpretation of that requirement) applies with equal force whichever supervisory function the employee exercises, it is difficult to understand why the interpretation would preclude supervisory status based on one function but not others.

In practice, of course, "an employee who exercises independent judgment * * * in directing other employees is likely to have been delegated substantial [other] authority by the employer to carry out directions to those employees." *Providence Hosp.*, 320 N.L.R.B. at 728 n.25. Because an employee's status as a supervisor is sometimes more clearly established based on that other authority, the Board has frequently found it unnecessary to reach the question whether the employee is a supervisor because he also exercises independent judgment in responsibly directing other employees.[6] See, *e.g.*, *Westwood Health Care Ctr.*, 330

[6] The Board also has elected "not to develop a full analysis of the term 'responsibly to direct' in the abstract." *Providence Hosp.*, 320 N.L.R.B. at 729. And, for reasons we have noted (NLRB Br. 21-22 n.9), this case does

N.L.R.B. No. 141, 2000 WL 309119, *6 & n.11 (Mar. 20, 2000) (unnecessary to decide "whether [nurses] had the authority under Sec. 2(11) to responsibly direct other employees" given finding that they possessed "authority to discipline employees within the meaning of Section 2(11)"); *Venture Indus., Inc.*, 327 N.L.R.B. No. 165, 1999 WL 161049, *3 & n.11 (Mar. 19, 1999) (unnecessary to decide whether supervisors "also have the authority to assign and direct work and effectively recommend the discharge of employees" given finding that they "possess supervisory authority within the meaning of Section 2(11) of the Act to discipline employees and to make effective recommendations regarding" hiring). That the Board often rests its findings of supervisory status on other grounds does not, however, mean that employees cannot be classed as supervisors based on authority responsibly to direct other employees. On the contrary, the Board has on several occasions found employees to be supervisors based on responsible direction. See NLRB Br. 19 n.7.[7]

Respondent further errs in asserting (Br. 14-16) that the Board's interpretation of "independent judgment" is inconsistent with comments made by Senator Flanders when he

---

not present the issue of the proper interpretation of "responsibly to direct."

[7] See also, *e.g.*, *Gem Urethane Corp.*, 284 N.L.R.B. 1349, 1349, 1359-1360 (1987) (employee who had "considerable discretionary authority" over the other employees was a supervisor, but employees whose direction involved only "routine directions given by a more experienced worker" and who made assignments and ensured the quality of the product but "operated within narrow and circumscribed confines" "in accordance with a work order" prepared by management were not supervisors); *Bailou Brick Co.*, 277 N.L.R.B. 41, 62 (1985) (employee who, "without consultation with higher management," assigned other employees to various tasks and directed "when they should start, and when they should stop * * * used independent judgment" and was therefore a supervisor), enforcement denied in part on other grounds, 798 F.2d 339 (8th Cir. 1986).

proposed adding the term "responsibly to direct" to the Act. Senator Flanders explained that his amendment brought within the supervisory category persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate Committee] report," who, although lacking authority to make "effective" changes in the status of subordinate employees, are vested with substantial "managerial duties." 93 Cong. Rec. 4677-4678 (1947) (emphasis added). Senator Flanders gave no indication that he intended the amendment also to bring within the supervisory category the "minor supervisory employees" who, consistent with the Board's administration of the Wagner Act, were excluded from the Senate Committee's definition of supervisor, despite the fact that they, in addition to performing their own work, provided limited direction for others based on technical skills or employer-specified standards. See S. Rep. No. 105, *supra*, at 4; NLRB Br. 24-32.

Senator Flanders wanted to clarify that the definition of supervisor includes an individual in charge of a "department" who does no hands-on work but, using "personal judgment[,] * * * determines under general orders what job shall be undertaken next and who shall do it." 93 Cong. Rec. at 4677-4678. Those responsibilities are similar to the duties of the industrial "foremen" in the *Packard* case, which Congress sought to overrule by enacting Section 2(11). See *Packard Motor Car Co.*, 61 N.L.R.B. 4, 22-23, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947). The duties of the RNs in this case are not comparable to those of foremen; rather, the RNs perform hands-on medical treatment and give limited direction to other members of their teams, based on their experience and special competence, pursuant to the

requirements of the residents' treatment plans. See NLRB Br. 42-43.[8]

d. As a final argument against the Board's interpretation of "independent judgment," respondent contends (Br. 21) that the interpretation is not entitled to deference because the Board "has engaged in blatant manipulation of the statute to further policy." Contrary to that contention, the Board has attempted to give concrete meaning to the term "independent judgment", which this Court has described as "ambiguous." See *HCR*, 511 U.S. at 579. As we have explained above and in our opening brief, the Board's interpretation is longstanding, widely applied, and fully consistent with the language, structure, and purpose of the NLRA. Moreover, the very reason that this Court accords "considerable deference" (*NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)) to the Board's interpretations of the Act is that the Board has been charged by Congress with the "often difficult and delicate responsibility" "to effectuate national labor policy." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). See also *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly,

[8] When an employee is vested with significant discretion to direct other employees within only "general orders," as described by Senator Flanders, the Board has found that the employee exercises "independent judgment" that triggers supervisory status. See cases cited at NLRB Br. 19 n.7 and note 7, *supra*. Because the Board's approach classes as supervisors all those who exercise "genuine management prerogatives," S. Rep. No. 105, *supra*, at 4, respondent's claim (Br. 16-17) that employers will be deprived of "loyal supervisors" is unfounded.

by Congress."). There is no cause to second guess the Board's implementation of that responsibility here.[9]

2. The second question presented by this case is whether the Board permissibly requires the party who alleges that an employee is a supervisor to prove the individual's supervisory status. Respondent contends (Br. 24-26) that the Board's General Counsel should bear the burden of proving that the individual is not a supervisor. Respondent reasons (Br. 24-25) that "proving that a particular individual is an 'employee' is an element of the claim against the employer" in an unfair labor practice case under Section 8(a) of the Act, 29 U.S.C. 158(a). From that premise, respondent asserts (Br. 25) that "[b]ecause the term 'employee' is defined by the

[9] In an effort to demonstrate that the Board has not applied its interpretation of "independent judgment" consistently, respondent cites (Br. 23) five Board decisions. Two of those decisions have been overruled, and the other three cases are fully consistent with the Board's current interpretation of independent judgment. In *Great American Products*, 312 N.L.R.B. 962 (1993), the employee found to be a supervisor "assigned work, issued oral warnings, transferred employees among machines and to other departments, granted time off, and effectively recommended that employees be tried in other departments." *Id.* at 962. The Board expressly affirmed the ALJ's determination that the employee "exercised independent judgment in the performance of those functions" and "[was] not just a skilled leadman." *Ibid.* That determination was based in part on evidence that the employee in question authorized another employee to take time off without consulting other management. *Id.* at 964. In *Clark & Wilkins Industries, Inc.*, 290 N.L.R.B. 106 (1988), aff'd, 887 F.2d 308 (D.C. Cir. 1989), cert. denied, 495 U.S. 934 (1990), the employee found to be a supervisor "decide[d] when other employees [were] to work at the site and the work they [were] to perform" and had "authority to change the work employees [were] doing * * * without prior consultation with [other management]." *Id.* at 109. Finally, in *National Living Centers, Inc.*, 193 N.L.R.B. 638, 639 (1971), enforced, 462 F.2d 575 (5th Cir. 1972) (Table), the employee found to be a supervisor had "discretionary" authority to "grant time off" and "effectively recommend[ed] discharges and transfers."

Act to exclude supervisors * * * the distinction between 'employees' and 'supervisors' is an element of the Board's case." Respondent's conclusion does not follow from its premise, however, because the question whether an individual is an "employee" under the Act is separate from, and does not depend on, the question whether that individual is a "supervisor."

As this Court has explained, the definition of "employee" in Section 2(3) of the Act, 29 U.S.C. 152(3), "seems to reiterate the breadth of the ordinary dictionary definition." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995). Thus, "employee" encompasses any "person who works for another in return for financial or other compensation." *Ibid.* (quoting *American Heritage Dictionary of the English Language* 604 (3d ed. 1992)). In an unfair labor practice case, the Board's General Counsel bears the burden of proving that the individuals seeking relief are "employees" in that sense, to the extent that the issue is in controversy (and was not litigated in an antecedent representation proceeding (see NLRB Br. 41; pp. 14-15, *infra*)).[10]

Whether such "employees" are "supervisors," however, is a separate question. The answer to that question does not depend on, and is analytically distinct from, whether they are "employees." See *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 413 (2d Cir. 1998) (explaining that the Board had carried its burden of proving that the disputed individuals "are employees of NYU Medical Center," but "they may or may not *also* be supervisors," a status that the employer bears "the burden of establishing"). As we have

[10] It is evident from the record that the registered nurses at issue in this case meet this definition of "employee," and their status has not been challenged by respondent. Cf., *e.g.*, *WBAI Pacifica Found.*, 328 N.L.R.B. No. 179, 1999 WL 676522, *6 (Aug. 26, 1999) (finding certain unpaid staff workers not "employees" under Section 2(3)).

explained (NLRB Br. 38), the text of Section 2(3) casts "any individual employed as a supervisor" as an exception from the broad definition of "employee." See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); see also *Town & Country Elec.*, 516 U.S. at 90 (noting that the Act's definition of employee "contains a list of exceptions"). If an "employee" is also a "supervisor," then the prohibitions against unfair labor practices contained in Section 8(a), which would otherwise constrain the employer, do not apply. Accordingly, if the employer contends that individuals shown by the General Counsel to be "employees" are also "supervisors," the employer properly should bear the burden of proving that claim. As this Court has explained, "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).[11] See also *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) (Board can require employer to prove a fact that Board reasonably construes as an affirmative defense to an unfair labor practice charge).

Amicus American Health Care Association (AHCA) mistakenly contends (Br. 7-10) that construing supervisory status as an affirmative defense in an unfair labor practice case and placing the burden of proving that status on the employer is not consistent with *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S.

[11] Amicus American Health Care Association seeks to avoid the force of that principle by contending (Br. 16), based on the legislative history of Section 2(11), that " 'supervisory status' is *not* an exemption from the Act, but an additional protected classification under the Act." But neither that history nor the statutory text supports its contention. Moreover, if Congress had wished to depart from the long-standing rule of statutory construction reiterated in *Morton Salt*, Congress could have provided a different allocation rule in the text of the Act, but it did not.

267 (1994). In *Greenwich Collieries*, *id.* at 276-278, the Court explained that the Board's allocation of the burden of proof in *Transportation Management* was permissible because "the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision," and "[o]nly then did the NLRB place the burden of persuasion on the employer as to its affirmative defense" that it would have fired the employee for permissible reasons in any event. Likewise, in an unfair labor practice case, the employer is required to bear the burden of proving that individuals are supervisors only *after* the General Counsel has proved that the individuals are "employees" as defined in *Town & Country* (if that question is in dispute). See *New York Univ. Med. Ctr.*, *supra*. Placing the burden of proving supervisory status on the employer in those circumstances is fully consistent with *Greenwich Collieries*.

AHCA also errs in contending (Br. 22) that, even when (as in this case) the supervisory issue has already been resolved in a representation proceeding, the same issue must be redetermined if the employer precipitates an unfair labor practice proceeding by refusing to bargain with the certified union. That contention—which would tend to prolong labor disputes, contrary to the Act's basic purpose—ignores the settled principle that, in the absence of newly discovered evidence or special circumstances, the General Counsel is not required to relitigate matters already decided in the underlying representation case. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941); see also NLRB Br. 41. Although AHCA seeks to avoid the force of that rule by suggesting (Br. 22) that a purported "lack of procedural safeguards" casts doubt as to whether "supervisory status is ever truly 'litigated'" in representation cases, that suggestion is without basis.[12] Moreover, even if relitigation of matters already decided in representation cases were required, the Board's General Counsel would not bear the burden of proving supervisory status in that relitigation, for the reasons we have explained above. See pp. 12-14, *supra*.

3. a. In our opening brief, we explain that the Board, applying its interpretation of "independent judgment" and the proper allocation of the burden of the proof, reasonably concluded that respondent's RNs are not "supervisors." See NLRB Br. 42-48. Respondent, however, contends (Br. 28-36) that the RNs are supervisors even under the Board's interpretation of "independent judgment." That contention rests primarily on job duties that the RNs purportedly perform in their capacity as "building supervisors." See, *e.g.*, Resp. Br. 28, 30. Respondent's contention is not supported by the record and fails to take into account that respondent bears the burden of proving the RNs' supervisory status.[13]

Respondent asserts (Br. 35) that the building supervisors "visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another." But the record evidence that respon-

---

[12] AHCA complains (Br. 21) that the Regional Director, rather than the hearing officer who "hears the evidence[,] * * * make[s] *de facto* credibility determinations insofar as he resolves testimonial conflicts by finding the facts to be as one side or the other posits." However, it is settled that due process does not require that "the decider must actually hear the witnesses or be furnished a report on their credibility" in Board representation proceedings. *Utica Mut. Ins. Co.* v. *Vincent*, 375 F.2d 129, 132-134 (2d Cir.), cert. denied, 389 U.S. 839 (1967).

[13] To the extent respondent's claim that the RNs are supervisors is premised on their direction of other employees (Br. 36), we have already explained that the RNs provide only limited direction to other members of their teams, based on their experience and special competence, pursuant to the requirements of the resident's treatment plan. See pp. 9-10, *supra*; NLRB Br. 42-43.

dent cites (Br. 3, 35) does not demonstrate that the building supervisors exercise any such judgment. See J.A. 18-19, 63; Tr. 147, 155. To the contrary, respondent's staffing policies specify the minimum number of employees necessary to cover a given shift. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27. The record does not establish the basis on which the building supervisors select the transferees.

Respondent also claims (Br. 35) that the building supervisors have authority to "increase the staffing level by arranging coverage from the preceding shift and/or by calling off-duty employees" in the event that "a problem arises with a resident or in the case of weather emergencies." That contention, however, is factually incorrect. The record establishes that the nurses do *not* have independent discretion to staff the facility at a higher level than prescribed by respondent. See J.A. 22, 23-24, 27-29. Neither the Board nor the court of appeals found otherwise, and the evidence cited by respondent does not support respondent's claim.[14] There is also no support for respondent's assertion (without citation to the record) (Br. 28) that the building supervisors "assign overtime." Indeed, the Board made, and the court of appeals accepted, the contrary finding that they do not have authority to compel employees to work. Pet. App. 16a, 51a; see J.A. 38. As we have explained, the building supervisors' actual responsibilities regarding staff coverage are routine

[14] In the testimony cited by respondent, its Administrator explained that the building supervisors "can situationally ask for an increase," for example, "if we have a problem where we need special supervision of a—of a resident." J.A. 24. However, the Administrator testified that, in that event, the building supervisors "would—they would call the person on call and ask for additional approval." *Ibid.*

and do not involve the exercise of independent judgment. See NLRB Br. 44-45.

Respondent further asserts (Br. 35) that the building supervisors "are responsible for overseeing all safety and resident issues that occur." However, the testimony on which respondent relies (J.A. 16-17) does not indicate which (if any) of the supervisory functions listed in Section 2(11) the building supervisors exercise, using independent judgment, in discharging this purported function. Indeed, the court of appeals did not rely on that responsibility to support its (mistaken) holding that the RNs are supervisors. See Pet. App. 18a-19a.

Finally, respondent relies (Br. 35) on the purported authority of the building supervisors to "write up employees" and "to send an employee home" for misconduct. As our opening brief explains, however, the Board properly concluded that respondent failed to prove that the building supervisors actually have that authority. See NLRB Br. 46-48. Respondent contends (Br. 40) that, in reaching that conclusion, the Board "disregarded" several company memoranda and ignored the principle that "[i]t is the existence of authority that counts under the statute, and not the frequency of its exercise." The Board, however, adheres to the principle cited by respondent (see, *e.g.*, *DST Indus., Inc.*, 310 N.L.R.B. 957, 958 (1993)), and did not "disregard" respondent's memoranda. Rather, the Board considered the documents but discounted their significance, considered in light of the full record, under the equally settled principle that "the nearly total lack of evidence of authority actually exercised" may negate "naked designations of 'paper power.'" *Oil Workers Int'l Union* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971), cert. denied, 404 U.S. 1039 (1972). See *Capital Transit Co.*, 114 N.L.R.B. 617, 619 (1955) ("where the issue is the actual existence of a supervisory power, the absence of any *exercise* of authority may negative its exis-

tence"); NLRB Br. 47-48. Because the record establishes that the building supervisors never exercised the disciplinary authority ostensibly vested in them by the memoranda, and because other evidence suggests that they lack such authority, the Board reasonably declined to find the RNs to be supervisors. See Pet. App. 50a-52a; J.A. 14-15, 26-27, 31, 38, 55-56; NLRB Br. 47.[15]

b. Finally, respondent mistakenly contends that the RNs must be classed as supervisors because they are the most senior employees on site for substantial periods (Br. 36-38), and there would purportedly be an unreasonable ratio of supervisors to employees if the RNs are not supervisors (Br. 38-39). As the Board has explained, "the Act does not state or fairly imply that the highest ranking employee [on site during] a shift is necessarily a supervisor, nor does it indicate that a group of individuals must have supervisory status simply to avoid having a particular ratio of employees to supervisors that, in the estimation of some tribunal, is 'too high.'" *Beverly Enters.—Ohio*, 313 N.L.R.B. 491, 500 (1993). Rather, such "secondary indicia" are "aid[s] in evaluating the existence of supervisory status," but are "not substitutes for the statutorily prescribed powers of Section 2(11)." *MDI Commercial Servs.*, 325 N.L.R.B. 53, 57 (1997). "[U]nless an individual possesses one or more of the statutory indicia of supervisory status, neither the ratio of supervisors to

[15] Similarly, although another memorandum (J.A. 62) states that the building supervisors are "in charge of the facility and all rehabilitation staff," the Board reasonably concluded that, as a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." Pet. App. 51a. Respondent's Administrator testified that the building supervisors' responsibility is "[p]rimarily to ensure that there's adequate coverage" and that coverage concerns prompted creation of the role. J.A. 18, 27; see J.A. 20. Moreover, the building supervisors do not consider themselves to be in charge of the rehabilitation staff. J.A. 50.

employees nor the fact that she may be the sole person in charge at times (nor both together) can transform her into a statutory supervisor." *Beverly Enters.—Ohio*, 313 N.L.R.B. at 500. See also NLRB Br. 45-46 & n.21. Because, as we have shown, the RNs do not exercise any supervisory power listed in Section 2(11) using independent judgment, they are not supervisors.[16]

In any event, the secondary indicia on which respondent relies are of limited usefulness in this case. Although the building supervisor "is the highest ranking employee in the building" for "almost two-thirds of the day" (Pet. App. 16a, 18a), a stipulated supervisor is "on call" at those times. *Id.* at 16a; J.A. 39. The building supervisors contact the "on call" supervisor when necessary. See J.A. 24, 52, 53. Respondent's assertion (Br. 39) regarding the ratio of supervisors to employees is also unpersuasive. Although respondent

[16] Respondent incorrectly contends (Br. 31-35), based largely on its inaccurate assertions about the authority of the RNs, that they possess the same authority as nurses found to be supervisors in prior Board cases. The employees found to be supervisors in the prior cases (except for one case that has been overruled) had significantly greater authority than the RNs here. See, *e.g.*, *Nymed, Inc.*, 320 N.L.R.B. 806, 813 (1996) (evaluation of aides); *Newton-Wellesley Hosp.*, 219 N.L.R.B. 699, 700 (1975) (approval of overtime, scheduling, and effective recommendation regarding hiring and firing); *Wing Mem'l Hosp. Ass'n*, 217 N.L.R.B. 1015, 1016 (1975) (authorization of overtime, scheduling, assignments, transfers, evaluations, and effective recommendation regarding hiring); see also note 9, *supra* (discussing *National Living Ctrs., Inc.*). The same is true of the employees to whose supervisory status "the parties stipulated" (Br. 30) in other cases cited by respondent. See, *e.g.*, *Schnurmacher Nursing Home* v. *NLRB*, 214 F.3d 260, 263 (2d Cir. 2000) (administration of the nursing department); *NLRB* v. *Grancare, Inc.*, 170 F.3d 662, 664 (7th Cir. 1999) (en banc) (scheduling and evaluation); *Sherewood Enters., Inc.*, 175 N.L.R.B. 354, 356 n.1 (1969) (discipline, evaluation, and effective recommendation regarding hiring and firing); see also pp. 7-8, *supra* (discussing *Westwood Health Care Ctr.*).

calculates a ratio of 5% if the RNs are deemed to be employees, which respondent regards as unrealistically low, that calculation is flawed.[17]

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed to the extent that the court held that the RNs employed by respondent are supervisors.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LEONARD R. PAGE
Acting General Counsel
National Labor Relations Board

JANUARY 2001

---

[17] Respondent's calculation is based on the unwarranted assumption that the employees "supervised" by the RNs include respondent's kitchen, housekeeping, and maintenance employees, as well as the rehabilitation counselors. See Br. 39. The kitchen, housekeeping, and maintenance employees have their own supervisors, who are stipulated to be Section 2(11) supervisors, and therefore should not be included in the ratio calculation. Pet. App. 45a, 54a; see *Beverly Enters.—Ohio*, 313 N.L.R.B. at 507 n.57. Further, respondent has never contended that the RNs supervise the rehabilitation counselors. A more realistic analysis yields a ratio of 10% if the RNs are treated as employees: 49 employees (6 RNs, 3 licensed practical nurses, and 40 rehabilitation assistants) to 5 supervisors (2 unit coordinators, a nursing coordinator, the administrator, and the assistant administrator). A ratio of 10% is not very different from the 12% figure that respondent deems "reasonable." Br. 39.

(12)

JAN 22 2001

Supreme Court, U.S.
FILED
JAN 22 2001
CLERK

No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

TABLE OF CONTENTS

	Page
I. The Board Correctly Applied Its Reasonable Construction of the Ambiguous Term "Independent Judgment" To the Facts of this Case	1
A. Neither the Employer Nor the Amicus Dispute the Actual Holding in this Case	1
B. The Board's Distinction Between "Supervisory 'Independent Judgment'" and Professional, Technical and Other Forms of Independent Judgment is Reasonable and Based on the Act	3
C. The Distinction Does Not Prevent Nurses and Other Professionals From Being Classified as Supervisors	7
D. The Board's Construction is Consistent With the Legislative History	11
E. Judicial Deference Is Due the Board's Construction	13
II. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Supervisory Exemption	15
A. The Administrative Procedure Act Does Not Apply to the NLRB's Unit Determination in this Case.	15
B. Exemption Is an Affirmative Defense Concerning Which The Proponent Has the Burden Of Proof Consistent With the APA.	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

AFL v. NLRB, 308 U.S. 401 (1940) 17
Boire v. Greyhound Corp., 376 U.S. 473 (1964) ... 17
Burns Electronic Security Services, Inc. v. NLRB, 624 F.2d 403 (2d Cir. 1980) 17
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13, 14
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 20
Debber Electric, 313 NLRB 1094 (1994) 10
KGW-TV, 329 NLRB No. 39 (1999) 3
Holly Farms Corp. v NLRB, 517 U.S. 392 (1996) 19, 20
Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971) 17, 18
Marine Engineers Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173 (1962) 8
Mississippi Power & Light Co., 328 NLRB No. 146 (1999) 4, 5, 6, 7, 8
Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959) 19
Newton-Wellesley Hospital, 219 NLRB 699 (1975) 9
NLRB v. Air Control Products, 335 F.2d 245 (5th Cir. 1964) 19
NLRB v. Champa Linen Service Co., 437 F.2d 1259 (10th Cir. 1971) 17, 19
NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947) 14
NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994) 4, 8
Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 14

TABLE OF AUTHORITIES—Continued

Page

Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941) 17, 18
Providence Hospital, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (9th Cir. 1997) ..... *passim*
Springfield Jewish Nursing Home, 292 NLRB 1266 (1989) 15
Ten Broeck Commons, 320 NLRB 806 (1996) 3, 4, 14
Thomas Davis Medical Center v. NLRB, 157 F.3d 909 (D.C.Cir. 1998) 18
Trevilla of Golden Valley, 330 NLRB No. 193 (2000) 14
Westwood Health Care Center, 330 NLRB No. 141 (2000) 15
Wing Memorial Hospital Ass'n, 217 NLRB 1015 (1975) 9

STATUTES:

5 U.S.C. § 554 19
29 U.S.C. §152(3) 19
29 U.S.C. §152(11) ..... *passim*
29 U.S.C. §152(12) 3
29 U.S.C. §158 .....15, 16, 18
29 U.S.C. §159 .....15, 16, 17, 18
29 U.S.C. §160 ..... 15, 16, 17

MISCELLANEOUS:

Legislative History of the Labor-Management Relations Act, 1947 .....10, 11, 12, 13

REPLY BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

I. The Board Correctly Applied Its Reasonable Construction of the Ambiguous Term "Independent Judgment" To the Facts of this Case

A. Neither the Employer Nor the Amicus Dispute the Actual Holding in this Case

In our opening Brief 4-6, 43-46, we demonstrated that the only authority actually possessed by the RN Building Supervisors is to insure that the minimum staff-to-resident ratio is maintained and to seek volunteers to work an extra shift if "the head count" reveals that additional staff is needed. JA 27. *See* PA 51a. The Employer asserts that as Building Supervisors "the RNs are in charge of the entire facility," KRCC Br. 2, and then cites three parts of the record that do not support the assertion: JA 17 on which the Administrator makes clear that the designation "means that they are responsible for kind of overviewing the coverage;" JA 29 on which he explains that they "make sure the head count is there;" and JA 36 which also indicates only that Building Supervisors handle "coverage issues."[1]

In our opening Brief 1-4, we demonstrated that the primary duty of the RNs is to personally provide medical care to the residents of the facility. Only as an incidental part of their

---

[1] One further example reflects the extent of the Employer's dishonest treatment of the record. The Employer concludes its statement of the facts, "'[W]hatever's necessary can be carried out" by the Building Supervisor. J.A. 28." KRCC Br. 5. But these words are taken from the testimony of the Administrator and refer to the Building Supervisor calling off-duty employees from a list to insure the minimum ratio: "sometimes maybe they only have to have them come in early a few hours, just to overlap so that, you know, whatever's necessary can be carried out."

own direct patient care do the RNs direct less skilled employees to perform specific tasks. The RNs have no authority to discipline an employee who refuses to provide such assistance. Indeed, the only specific example of such limited direction found in the record is RNs requesting that an LPN give a particular medication to a resident. PA51a.

The Employer, again incorrectly, asserts that the "LPNs are supervised by and must comply with the directions of the RNs," KRCC Br. 2, and cites three parts of the record: JA 17-18 which states only that RNs ask LPNs to pass medications; JA 29 which is irrelevant; and JA 54 which states that an RN was told that "RN's and LPN's are the same at Caney Creek;" that an LPN should do what an RN directs "in some cases" but that an RN would yield to a more expert LPN; and that a disagreement between an RN and an LPN would be resolved by their supervisor, the Clinical Coordinator. Similarly, the Employer asserts that "[t]he RNs also direct the 40 rehabilitation assistants on how to deal with unusual situations that arise whenever a rehabilitation counselor is not present," KRCC Br. 2, but cites for support one page of the record, JA 16, that is irrelevant. The Employer continues by asserting that the Rehabilitation Assistants must report resident medical problems to the RNs and "follow the RN's instruction," KRCC Br. 2, but there is nothing in the cited record reference, JA 57, 58, that suggests the latter requirement.

In sum, the Employers literally says nothing that undermines the Board's finding, guided by the principles set forth in *Providence Hospital*, 320 NLRB 717, 727 (1996), *enf'd*, 121 F.3d 548 (9th Cir. 1997), that: i) the RN Building Supervisors' limited and tightly regulated assignment of other employees did not "require[] the use of independent judgment" ; and ii) that, while the RNs might exercise independent judgment in carrying out their own professional duties, their delegation of discrete tasks to others does not

"require[] the use of independent judgment." 29 U.S.C. §152(11).

B. The Board's Distinction Between "Supervisory 'Independent Judgment'" and Professional, Technical and Other Forms of Independent Judgment is Reasonable and Based on the Act

The Board's conclusion in this case flows from the construction of the Act articulated in *Providence* and *Ten Broeck Commons*, 320 NLRB 806 (1996), which was drawn from long-standing decisions concerning other occupations and which has since been elaborated in relation to other categories of employees:

> [W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. . . . Independent judgment must be exercised in connection with the §2(11) function if the actor is to be deemed a statutory supervisor. [*Providence*, 320 NLRB at 728.]

The Employer argues that the Board has created a "false dichotomy between professional judgment and independent judgment." KRCC Br. 9. To the contrary, what the Board has done is to recognize a distinction between *professional* independent judgment and *supervisory* independent judgment that is required by the statutory definitions

By distinguishing "discretion or judgment . . . [that] relates to [employees' performance of] their own responsibilities and is based on their experience and expertise" from "the exercise of supervisory independent judgment," *KGW-TV*, 329 NLRB No. 39 at 5-6 (1999), the Board faithfully adheres to the distinction drawn by the Act between "employees"—including "professional employees," who, by definition, "exercise . . . discretion and judgment," 29 U.S.C. §152(12)(a)(ii)—and "supervisors." The Act provides that a

person is "employed as a supervisor" *only* if that "individual ha[s] authority" to act as a supervisor in one of the respects identified in § 2(11) *and* "the *exercise of such authority* . . . requires independent judgment." 29 U.S.C. § 152(11) (emphasis added). In this way, the statutory definitions draw "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 583 (1994) (*HCR*).

In nurse and non-nurse cases, then, the Board has properly used the term "supervisory 'independent judgment'" to identify the nature of the independent judgment that must be exercised by a statutory supervisor. *See Providence*, 320 NLRB at 730; *Mississippi Power & Light Co.*, 328 NLRB No. 146 at 7 (1999). The evidence must "show that the [employees'] assignment and direction require the use of supervisory 'independent judgment.'" *Id.*

The Board's approach in this regard is spelled out in great detail in *Mississippi Power*—a recent, comprehensive decision which applies the principles articulated in *Providence* and *Ten Broeck* in a case involving neither professional employees nor the health care industry. The analysis in *Mississippi Power* provides a fully reasoned answer to the Employer's "false dichotomy" charge. As *Mississippi Power* demonstrates, the Board's application of the statutory definition of "supervisor" turns on a "distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees." 328 NLRB No. 146 at 10. In this regard, the Board distinguishes between "the exercise of judgment pursuant to an employee's professional, technical, or experienced special knowledge or expertise" in carrying out the employee's "own responsibilities" and "the exercise

of Section 2(11) supervisory independent judgment." *Id.* at 9-10.

Mississippi Power applies the same distinction that is the basis for the Board's decision here, but it does so in analyzing whether certain dispatchers employed by an electrical power company—rather than nurses employed in a residential care facility—are supervisors. The Board begins by emphasizing that the dispatchers in question had "responsibilities [that] are two-fold, i.e., their selection or design of switching orders, and their communication with field employees" regarding these orders. 328 NLRB No. 146 at 9. With regard to their first set of responsibilities, the Board found that the "dispatchers exercise substantial and significant independent judgment in applying their own technical training, experience, and expertise to the portion of their jobs which involves the selection or design of the proper switching sequences for planned or emergency [power] outages." *Id.* at 9. But the Board concluded that "the exercise of special knowledge or expertise" by the dispatchers in the "performance of their own job" did "not constitute the exercise of Section 2(11) supervisory independent judgment," because it was "quite different from the exercise of independent judgment in overseeing the work of others." *Id.* at 9-10.

Turning to "[t]he second part of the . . . dispatchers' responsibilities," the Board found that "their interaction with field employees . . . is limited to communicating or relaying the switching orders or sequences, making certain that the actual switching has been done, and ascertaining from the field employees where and what the trouble is during power outages." *Id.* at 10. Noting that "the communication of . . . switching orders simply involves relaying the switching sequence, step-by-step, to field employees," the Board concluded that "this relay of information . . . does not entail the exercise of supervisory independent judgment." *Id.* In

sum, having found that "[w]hat judgment is necessary to the dispatchers' jobs already has been undertaken by . . . the dispatchers . . . in designing the proper switching sequences," the Board concluded that "[t]he mere communication of these technical decisions does not constitute statutory supervision." *Id.* The Board recognized that the "'back-and-forth' communication" between the dispatchers and the field employees did "[i]n a sense, . . . involve[] 'directing' the field employees in the performance of their work" and, taking that into account, the Board concluded that, because "this relay of information . . . does not entail the exercise of supervisory independent judgment." *Id.*

The RNs, in this case, like the dispatchers in *Mississippi Power*, "exercise substantial and significant independent judgment in applying their own . . . experience, and expertise . . . [in] [t]he performance of their own job[,]" but not in the communication of their decisions to others in the form of directions. 328 NLRB No. 146 at 9-10. It may be true that "rarely anything . . . is routine" at residential care facilities like Caney Creek, because "unexpected situations involving residents do occur." KRCC Br. 12. However, "the judgment exercised by the [RNs] in [responding to the residents' varying medical needs] is a function of the [nurses'] own work, based on their training, knowledge, and experience and does not constitute the exercise of independent supervisory judgment." *Mississippi Power*, 328 NLRB No. 146 at 10.

To be sure, executing such treatment decisions will often require "'back-and-forth' communication," between the RNs and the other staff. *Id.* But the RNs' exercise of independent judgment in the "performance of their own job . . . is quite different from the exercise of independent judgment in overseeing the work of others." *Id.* Put simply, it may not be "routine" for a facility resident to exhibit certain symptoms and thus it may require independent professional judgment for a RN to decide what form of medication should be given

to the resident. But it does not follow that asking the only LPN on duty to give the medication to the resident "requires the exercise of independent judgment" as required by §2(11). By conflating professional independent judgment and supervisory independent judgment, the Employer "fails to appreciate the distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees." *Mississippi Power*, 328 NLRB No. 146 at 10.

Finally, the Employer's emphasis on the importance of the decisions made by the RNs has no statutory foundation. In *Mississippi Power*, the Board, faced with a situation involving skilled employees with comparably sensitive responsibilities, correctly warned against being "swayed by the complexity of the [employees'] responsibilities and the adverse consequences to the well-being, safety, and lives of the public and employees that might result from [employees'] faulty decisions. . . . That severe consequences might flow from the [employees'] misjudgments in their own work . . . does not necessarily make their judgments supervisory." 328 NLRB No. 146 at 5-6. Grave consequences may flow from nurses' choice to use the wrong medication, but that does not make nurses supervisors merely because they invoke the assistance of employees assigned to help them execute their professional decisions when "the exercise of such authority" does not "require[] the use of independent judgment." 29 U.S.C. §152(11).

C. The Distinction Does Not Prevent Nurses and Other Professionals From Being Classified as Supervisors

The Employers' key assertion—that, extended to its logical conclusion, the Board's construction of the Act would prevent any nurse, indeed, any professional from being classified as a supervisor—is belied by the Board's jurisprudence. The Board has, in fact, classified both nurses

and other professionals as supervisors, *see* Union's opening Brief at 36 n. 16, and done so on the proper statutory grounds that, unlike the RNs at issue in this case, those individuals did exercise independent judgment in the direction and assignment of employees. Thus, it is clear that the Board been sensitive to this Court's instruction in *HCR* not to "read[] the responsible direction portion of § 2(11) out of the statute in nurse cases." 511 U.S. at 579.

Contrary to the Employer's assertion, the distinction between "discretion or judgment . . . [that] relates to [employees' performance of] their own responsibilities" and "the exercise of supervisory independent judgment," *KGW*, 329 NLRB No. 39 at 5-6, does *not* "eliminate professionals as supervisors." KRCC Br. 17. In the first place, the Board has not confined this analytical distinction to cases involving "professionals," but has "applied this general principle to various relationships, including those involving charge nurses, journeymen construction workers, engineers, and tugboat docking pilots." *Mississippi Power*, 328 NLRB No. 146 at 10 (citations omitted). More basically, under the Board's approach a professional employee will be deemed a supervisor so long as he or she "exercise[s] . . . independent judgment in overseeing the work of others." *Id.* at 10.

The Board's approach is nuanced as it must be to address the "infinite and subtle" "gradations of authority" that exist in the workplace. *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 179 n. 6 (1962). Indeed, in every health care case that has come before it, the Board has drawn a line between those nurses who exercise independent judgment in supervising other employees and those who exercise independent judgment in the performance of their own work but not in the incidental assignment and direction of others—in some cases by accepting the parties' stipulation and in others through adversarial litigation. *See, e.g., Newton-Wellesley Hospital*, 219 NLRB 699, 700-02 (1975)

(holding nurse supervisors and others to be supervisors, but not head nurses); *Wing Memorial Hospital Ass'n*, 217 NLRB 1015, 1015-16 (1975) (holding nurse shift supervisors to be supervisors, but not head nurses).

The Board, moreover, has excluded some nurses as supervisors on the grounds that they exercise independent judgment in the direction and assignment of subordinates while, in the same case, including other nurses who, in the course of their own work as professionals incidentally direct or assign others, but who do not exercise independent judgment in the acts of supervision. *See, e.g., Newton*, 219 NLRB at 700-02; *Wing*, 217 NLRB at 1015-16 (nurse shift supervisors "in charge of nursing and other personnel on their shift [and] responsibly direct them" and "select[] the personnel for each section" while head nurses assign personnel to patients in section and "give[] direction to other employees which is incidental to the professional's treatment of patients"). In this case itself, the parties stipulated and the Board found that one of the seven nurses, the Clinical Coordinator, was a supervisor, in part because she assigned nursing personnel to shifts which the Board explained in *Providence* is "the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment." 320 NLRB at 731; JA 29, 34; PA 54a.

It is thus clear that the Board has *not* suggested, as the Employer asserts, that the exercise of professional judgment can never overlap with the exercise of supervisory independent judgment. A professional in the position of a supervisor, such as a Director of Nursing, surely relies on professional judgment in performing a range of §2(11) functions that themselves require the use of independent judgment. The infusion of professional judgment into the independent supervisory judgment unquestionably exercised by such an official does not remove him or her from the

category of supervisor, and the Board has never so held. Rather, the Board's analysis is implicated only in cases like this one where the professionals are both working at their trade and, incidental to their own work, assigning and directing others. It is only in this type of case that the Board is required by the text of the Act to sort out professional judgment from "supervisory 'independent judgment.'" And it is only in this type of case that the Board's conclusion in *Providence*—that "Section 2(11) supervisory authority does not include . . . the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training"–comes into play. 320 NLRB at 729. The Board's position that the exercise of professional judgment in cases like this is not necessarily the exercise of "supervisory 'independent judgment'" is a far cry from a holding that no nurse and no professional can be a supervisor. That is why the Board has held, contrary to the Employers' assertions, that nurses and other professionals are supervisors when their assignment and direction of other employees is not incidental to the performance of their own professional duties or, in other words, when they are "truly supervisory" as intended by Congress. *Legislative History of the Labor Management Act, 1947* 425(hereinafter *Leg. Hist.*).

The sum of the matter is that the Board has neither classified all nurses as employees nor as supervisors. Rather, the Board has drawn a line between classes of nurses based on the nature of the authority they exercise over other employees at particular workplaces. The Board's decisions concerning nurses are thus part of the larger tapestry of its supervisor jurisprudence. For example, in *Debber Electric*, 313 NLRB 1094 (1994), the Board drew a line between one skilled electrician, who was classified as a supervisor solely on the grounds that he assigned and directed employees, and another electrician, who was classified as an employee because he merely directed other employees working with

him "'the way a journeyman would tell an apprentice' what to do." *Id.* at 1096. This distinction is true to Congress' intention to exclude only "foreman and persons of like or higher rank" and not "leadmen . . . and other minor supervisory officials." *Leg. Hist.* 539, 410.

The Employer's construction of §2(11), in contrast, threatens to sweep all nurses and professions outside the protection of the Act as supervisors. As SFHRM acknowledges, virtually all nurses have some authority to assign less skilled employees and direct their work. SFHRM Br. 5-7. Acceptance of the Employers' position would thus lead to the removal of virtually all nurses from the protection of the Act. Indeed, as the Employers do not refute the fact that the Board has applied the same construction of the Act to other professionals and skilled employees, acceptance of the Employers' position will sweep large numbers of employees in a wide-variety of professions and occupations outside the protection of the Act. The Employer's position is thus contrary to Congress' clear intent to exclude only "foremen and persons of like or higher rank" and not "leadmen . . . and other minor supervisory employees" under §2(11). *Leg. Hist.* 539, 410.

D. The Board's Construction is Consistent With the Legislative History

The legislative history of §2(11), discussed at length in our opening Brief 21-28, simply could not be clearer in revealing Congress' intent: (i) to exclude only "foremen and persons of like or higher rank," but not "leadmen . . . and other minor supervisory employees," *Leg. Hist.* 410, 539; and (ii) that the requirement of "independent judgment" be used to draw this distinction.[2] The Board has respected Congress' clear intent

[2] Notably, the rejected House bill not only contained a broader array of supervisory functions, but did not require that their performance entail the

by construing the ambiguous term "independent judgment" so that nurses and other professional who are at a "like or higher rank" as foremen–for example, Directors of Nursing in other cases and the nurse Clinical Coordinator in this case–are excluded as supervisors while working nurses like the RNs in this case are included as employees.

The Employers pay scant attention to the legislative history with the exception of the Flanders amendment.[3] But the adoption of that floor amendment to the Senate definition of supervisor is in no way inconsistent with the congressional intent reflected in the legislative history taken as a whole.[4]

To the contrary Senator Flanders made clear that his amendment was not intended to exclude all employees who direct others. Rather, he was concerned about "men . . .

---

use of independent judgment. *See Leg. Hist.* 167 (H.R. 3020, §2(12)(A)(I), as passed by House).

[3] SFHRM cites language in the House Committee Report listing "nurses" as among the classifications that the House bill intended to exclude. SFHRM Br. 17-18. However, the broader House bill, including the language referenced in the quoted Committee Report, was rejected in favor of the narrower Senate version. Moreover, the reference to nurses had nothing to do with the type of supervisory authority at issue. Rather, as the cited Report itself makes clear, the House Committee was concerned that "[d]octors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health." *Leg. Hist.* 307. The rejected House bill addressed this concern by including within the definition of supervisor "any individual . . . who is employed . . . in connection with claims matters of employees against employers." *Leg. Hist.* 40-41 (H.R. 3020, §2(12)(B), as reported).

[4] In fact, the Employers do not rely on the text of the Flanders's amendment or its adoption, but rather on one phrase in the Senator's explanation of the amendment. However, Senator Flanders' comment cannot be understood to modify Congress' intent in relation to the phrase "independent judgment," as the Employers suggest, as it was made with reference to his amendment which added only the phrase "responsibly to direct."

above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees.'" *Leg. Hist.* 1303. He was concerned about officials with "a large responsibility." *Id.* He intended to exclude only an official "charged with the responsible direction of his department and the men under him." *Id.* In other words, Senator Flanders was concerned that under "modern [personnel] practice" many of the functions enumerated in section §2(11) were transferred "to a personnel manager" and that a department head or foreman might actually not be classified as a supervisor contrary to his colleagues' intent. *Id.*

Senator Taft accepted the amendment as a friendly one that did not alter the fact that "[t]he definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years"–a definition that had not classified skilled workers with incidental authority to direct other as supervisors. *Id.* at 1304; *see* Union's opening Br. 24-26. The amendment's adoption by voice vote without debate makes clear that it was understood only to insure that Congress' previously expressed intent that employees like foremen and department heads who do not themselves work at a trade but direct the work of an entire department be classified as supervisors even if they have none of the other duties enumerated in the original Senate bill.

E. Judicial Deference Is Due the Board's Construction

The Employer argues that the Board's construction of the ambiguous term "independent judgment" is not due deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "[t]he NLRB has used arbitrary and manipulative means to achieve policy-directed results." KRCC Br. 21. But this Court has made clear that "resolution of ambiguity in a statutory text," such as that created by the term "independent judgment," "is often more a question of policy than of law" and "federal judges . . .

have a duty to respect legitimate policy choices" of agencies charged with statutory enforcement. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Chevron* , 467 U.S. at 866.

So long as the agency's construction satisfies the *Chevron* standard, it cannot be overturned based on groundless speculation into the agency's motives of the type engaged in by the Employer. This Court has long refused to engage in just this sort of inquiry into the "unexposed mental processes" of the Board. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947). "In light of the authority with which Congress has endowed the Board, and with due regard to the conscientiousness which [this Court] must attribute to another branch of the Government," this Court must evaluate the Board's decisions based on their express rationale and not presume some unarticulated, improper motive. *Id.*

As explained at length in our opening Brief 32-37, since *HCR*, the Board has treated nurses "the same as all other employee classifications and . . . appl[ied] to them the same test [it] appl[ies] to all other employees." *Ten Broeck*, 320 NLRB at 810. The Employers insist repeatedly that the Board has adopted a construction of the Act unique to nurses. But the Board has expressly done the contrary, applying long-standing and generally applicable principles in the nurse cases and relying on the nurse cases to guide its broader supervisor jurisprudence. Neither the Employer nor SFHRM cites any case where the Board has failed to apply the construction at issue to non-nurse employees. The Board is also committed to "use the same standard in unfair labor practice [ulp] cases as in representation cases. *Providence*, 320 NLRB at 730 n. 31. The Board has sometimes rejected the union's position in both types of cases, holding in representation cases that nurses are supervisors, most recently in *Trevilla of Golden Valley*, 330 NLRB No. 193 (2000), and in ulp cases both that accused nurses are not supervisors and thus not agents of the

employer, *see, e.g., Springfield Jewish Nursing Home*, 292 NLRB 1266 (1989), and that charging-party nurses are supervisors and thus not employees protected from their employer's conduct, most recently in *Westwood Health Care Center*, 330 NLRB No. 141 (2000). Different outcomes have been based on the facts of the cases not on the identity of the parties or nature of the proceedings.

II. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Supervisory Exemption

A. The Administrative Procedure Act Does Not Apply to the NLRB's Unit Determination in this Case

The Employer's position is that in the instant refusal-to-bargain ulp case arising under NLRA §10—where the only issue is the appropriateness of the bargaining unit as previously determined in a related NLRA §9 representation proceeding and where the party challenging that unit determination has not asserted any special circumstances calling for relitigation of the unit question—it is the burden of the NLRB General Counsel to *dis*prove the claims advanced by the Employer in challenging the Board's prior bargaining unit determination in the representation case. The Employer rests its argument on the proposition that "[p]ursuant to the [Administrative Procedure Act (APA)], the burden is on the Board [—actually, the Board's General Counsel—] to prove all the elements of a Section 8 claim." KRCC Br. 24. The Employer then argues that "in a Section 8(a)(5) case, the Board should have the burden of proving that the employer failed to bargain with an appropriate unit," and that this entails proving that the "bargaining unit [is] made up of 'employees' and no 'supervisors.'" *Id.* at 25-26. *See also* Amer. Health Care Ass'n (AHCA) Br. 5-10.

A basic flaw in the Employer's argument is that the appropriateness of the bargaining unit is *not* an element of the

ulp allegation put before the Board in a §8(a)(5) case based on an employer's refusal to bargain with the representative certified in a §9 representation case. To the contrary, as we show by tracing the process outlined by Congress, the Act expressly contemplates that the Board may rely on the unit finding that underlies the certification issued in a §9 representation case in deciding a subsequent refusal-to-bargain ulp case brought under §10.

The Act provides, first of all, that the Board "shall" determine "the unit appropriate for the purposes of collective bargaining" in a representation case arising under § 9, 29 U.S.C §159(b), rather than in a ulp case arising under §10(c). Thus, a finding that the unit is appropriate necessarily underlies all certifications issued under §9(c)(1). The Act also provides that among the ulp cases arising under §10(c) are §8(a)(5) cases, such as the instant case, in which the NLRB General Counsel alleges that an employer has "refuse[d] to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." 29 U.S.C. §158(a)(5). In such cases, the Act expressly states that the "order of the Board made pursuant to section 10(c)," remedying the ulp, may be "based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of [§9]." 29 U.S.C. §159(d).[5]

[5] In full, the subsection provides:

> Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. [29 U.S.C. §159(d).]

It is significant that the statute does *not* provide for the inclusion of the record from the §9 proceeding in the record *before the Board* in the related ulp proceeding under §10. Rather, the §9 record is only included in the record filed with the court of appeals on a petition for review or enforcement of the order resulting from the ulp case. Thus, the statute expressly contemplates "an order of the Board made pursuant to section 10(c) [that] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of . . . section [9]," without "the record of such investigation" being before the Board in the §10 proceeding. 29 U.S.C. §159(d).

Based on this statutory scheme, it is firmly established that "when the Board resolves an issue after a fair hearing in Section 9 representation proceedings, it is not required to reconsider the same issue and evidence in the ensuing [ulp] proceedings under Section 10." *NLRB v. Champa Linen Service Co.*, 437 F.2d 1259, 1261 (10th Cir. 1971). In particular, in a ulp case where the employer "contests the election, including the unit determination" made by the Board in a prior representation case, "the determination of the bargaining unit . . . need not be reviewed by the Board." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139 (1971). *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-162 (1941).[6]

This Court explained the relationship between a representation proceeding under §9 and a refusal-to-bargain ulp proceeding under §10 in both *AFL v. NLRB*, 308 U.S. 401, 406 (1940), and *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964).

[6] This rule against relitigation "protects the integrity of the administrative process by requiring a party to produce all available evidence relevant to the unit certification issue at the time of the original representation hearing rather than attempting to relitigate the unit issue in the context of the subsequent [ulp] hearing." *Burns Electronic Security Services, Inc. v. NLRB*, 624 F.2d 403, 407 (2d Cir. 1980).

Under this statutory scheme, the Board may conclude that an employer has "refuse[d] to bargain collectively with the representatives of his employees, subject to the provisions of section 9," 29 U.S.C. §158(a)(5), by finding: i) that such a representative has been certified pursuant to §9; ii) that the representative has requested to bargain with the employer; and iii) that the employer has refused that request. Accordingly, the General Counsel's burden in such a ulp case is to prove these three elements, and *not* to prove the facts underlying the certification or to disprove employer claims of error in the unit determination made in the related §9 representation case. *See* NLRB Br. 41. In the instant case, the General Counsel met this burden by alleging these three elements, Complaint ¶s 6, 8 & 9, and obtaining admissions of each, Answer ¶s 6, 8 & 9.

The foregoing makes it plain that the Employer has no APA argument at all. In a case like this, the Board's unit determination is made in a representation proceeding under §9, and such a proceeding is exempt from the APA hearing requirements. *See* 5 U.S.C. §554(a)(6) ("This section applies . . . in every case of adjudication . . ., except to the extent that

---

"[T]he Board has discretion [in §10 ulp cases] to reopen the issue [decided in a prior §9 representation case] where newly discovered noncumulative evidence is available," *Magnesium Casting*, 401 U.S. at 139-140, or some other "special circumstances" warrants reopening the issue. *Thomas Davis Medical Center v. NLRB*, 157 F.3d 909, 912-13 (D.C.Cir. 1998). Thus, the Employer in the instant refusal-to-bargain ulp case could have requested reconsideration of the Board's prior unit determination on the grounds that the "representation procedures [we]re inadequate to establish [the] factual basis" for that determination as the AHCA argues in the abstract may be the case. AHCA Br. 19. However, the Board found that the Employer "d[id] not offer to adduce at a hearing [in the ulp case] any newly discovered and previously unavailable evidence, nor d[id] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding," PA 27a, and the Employer is therefore precluded from raising these issues under *Pittsburgh Plate Glass*, 313 U. S. at 162.

there is involved . . . the certification of worker representatives.") "In recognition of their unique character, Congress has removed representation hearings from the requirements of §5 of the A[PA]." *NLRB v. Air Control Products*, 335 F.2d 245, 251 (5th Cir. 1964). Neither "the letter [n]or spirit of the [APA] is violated by the fact that the unit determination made in the exempt representation proceedings [i]s not relitigated or tried *de novo* in the [ulp] proceedings." *Champa Linen*, 437 F.2d at 1262. This is so because "the representation proceedings [a]re exempt from the provisions of the Act, and the [ulp] proceedings, though not exempt under the Act, [a]re conducted in accordance with the provisions of the Act." *Id.* (citations omitted).

B. Exemption Is an Affirmative Defense Concerning Which The Proponent Has the Burden Of Proof Consistent With the APA

While the foregoing is dispositive, we add that, even in proceedings that are governed by the APA, it is proper to place the burden of proof on the party asserting an affirmative defense based on an exemption from statutory coverage.

The term "employee" is defined broadly by the NLRA to include "any employee." 29 U.S.C. §152(3). The Act's broad protection of "any employee" is subject to six specific exceptions, including "any individual employer as a supervisor." *Id.* The specific exceptions to the NLRA definition of covered "employee[s]" have been characterized by this Court as "exemptions from NLRA coverage." *Holly Farms Corp. v NLRB*, 517 U.S. 392, 399 (1996). And, the Court has warned, these "exemptions . . . are not [to be] so expansively interpreted as to deny protection to workers the Act was designed to reach." *Id.* As support for this reading of the NLRA, this Court relied upon cases holding that "exemptions from the Fair Labor Standards Act are to be narrowly construed." *Id.* (*quoting Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959)).

The same line of FLSA cases relied upon in *Holly Farms* also hold that "the application of an exemption . . . is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). The Board has correctly relied on these cases—and the principle of statutory construction employed in them—in allocating the burden of proof to the party claiming that an employee comes within the exemption for supervisors.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be reversed.

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*

No. 99-1815 (6)

MOTION FILED NOV 17 2000

NOV 17

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNICTY CARE INC., *et al.*,
Respondent.

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO,
Respondent/Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AND UNITED FOOD AND COMMERCIAL WORKERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DAVID J. STROM
STEPHANIE S. BAXTER
555 New Jersey Avenue, N.W.
Washington, DC 20001

Attorneys for the American Federation of Teacher's AFL-CIO

JACK DEMPSEY
LARRY WEINBERG
MARGARET MCCANN
1108 17th Street, N.W.
Washington, DC 20006

Attorneys for American Federation Municipal and County Employees, AFL-CIO

JUDITH A. SCOTT *
DIANA O. CERESI
1313 L Street, N.W.
Washington, DC 20005
(202) 898-3455

Attorneys for Service Employees International Union

ROBERT E. FUNK, JR.
1775 K Street, N.W.,
Washington, DC 20006

Attorney for United Food & Commercial Workers, AFL-CIO

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. INTRODUCTION	3
B. THE ROLE OF STAFF NURSES IN NURSING HOMES	5
1. General Demographics	5
2. Staff Nurses In Nursing Homes Are Direct Care Providers	7
3. Staff Scheduling In Nursing Homes	10
4. Staff Nurses Are Poorly Compensated And Work Under Difficult Conditions	13
5. Working Conditions And Quality of Care	16
CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Airkaman, Inc., 230 NLRB 924 (1977))	12
Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978)	3, 17, 18
Beverly California v. NLRB, 970 F.2d 1548 (6th Cir. 1992)	5
Beverly Enterprises v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997)	4, 9
Beverly Enterprises v. NLRB, 148 F.3d 1042 (8th Cir. 1998)	4, 12
Beverly Enterprises v. NLRB, 165 F.3d 290 (4th Cir. 1999)	4, 9
Beverly Enterprises v. NLRB, 165 F.3d 307 (4th Cir. 1999) (en banc)	4, 12
Beverly Health & Rehabilitation Service, Inc. v. NLRB, 181 F.3d 99 (Table) 1999 U.S. App. LEXIS 8395 (6th Cir. 1999)	4, 9
Caremore v. NLRB, 129 F.3d 365 (6th Cir. 1997)	4, 9
Edgewood Nursing Ctr., Inc. v. NLRB, 142 F.3d 433 (Table), 1998 U.S. App. LEXIS 3151 (6th Cir. 1998)	4, 9
Glenmark Assoc. v. NLRB, 147 F.3d 333 (4th Cir. 1998)	9
Grancare, Inc. v. NLRB, 137 F.3d 372 (6th Cir. 1998)	4, 12
Integrated Health Services v. NLRB, 191 F.3d 703 (6th Cir. 1999)	4, 11
Manor West Inc. v. NLRB, 60 F.3d 1195 (6th Cir. 1995)	4
Mid-America Care Foundation v. NLRB, 148 F.3d 638 (1998)	4, 6
National G. South, Inc., 230 NLRB 976 (1977)	12
NLRB v. American Med. Services, Inc., 705 F.2d 1472 (7th Cir. 1983)	12

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Attleboro Assoc., 176 F.3d 154 (3d Cir. 1999)	4
NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Cir. 1987)	5
NLRB v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999)(en banc)	4, 12, 13
NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994)	4
NLRB v. Hilliard Dev. Corp., 187 F.3d 133 (1st Cir. 1999)	4, 9, 11
Northern Montana Health Care Ctr. v. NLRB, 178 F.3d 1089(9th Cir. 1999)	4
Rehabilitation & Healthcare Center v. NLRB, 178 F.3d 1296 (Table) 1999 U.S. App. Lexis 5878 (6th Cir. 1999)	5
Rest Haven Living Ctr., Inc., 322 NLRB 210 (1996)	9
Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2d Cir. 2000)	4, 9

FEDERAL STATUTES & REGULATION

29 U.S.C. § 151(11)	3
42 U.S.C. § 1396r(b)(4)(c)	6
42 CFR § 483.30	6, 10

MISCELLANEOUS

Alder, Contemporary's 1999 Nursing and Administrative Salary Survey, Contemporary Long Term Care	8, 13
Allen, Nursing Home Administration, (3d ed. 1997)	8
BLS, Occupational Classification System Manual	7, 8

TABLE OF AUTHORITIES—Continued

Page

BLS, Occupational Injuries and Illnesses: Industry Data (1989-current) 13

BLS, Occupational Outlook Handbook 227 (BLS 2000-01) 6, 8, 13, 14

Dellefield, The Relationship Between Nurse Staffing in Nursing Homes and Quality Indicators: A Literature Review, J. Gerontology (June 2000) 11

Gabrel, An Overview of Nursing Home Facilities: Data from the 1997 National Nursing Home Survey, Advance Data from Vital and Health Statistics (National Center for Health Statistics, DHHS Pub. No. (PHS) 2000-1250, No.311, 2000) 5, 6, 11

Gordon, Life Support: Three Nurses in the Front Lines 12 (Little Brown & Co. 1997)..... 7, 17

Harrington, Nursing Facility Quality, Staffing and Economic Issues, IOM, Nursing Staff in Hospitals and Nursing Home 453 .....5, 13, 16

Harrington, et. al., Nursing Facilities, Staffing, Residents and Facility Deficiencies, 1992 through 1998, 55 Gerontology (Sept. 2000) 11

Harrington, Wages & Benefits of Nursing Personnel Nursing Homes, 8 Nursing Economics 378 (1990) 13, 15

HCFA, Report to Congress: Appropriateness of Minimum Staffing Ratios in Nursing Homes, 2-1, (Summer 2000) 5, 6, 10, 11, 15, 17

Himmelstein and S. Woolhandler, Medical Care and Employment in the United States, 1968 to 1993, Health Policy and Reform in the U.S. Health Care Delivery System 182 (Harrington and Estes, eds., 3d ed. 2001) 7

TABLE OF AUTHORITIES—Continued

Page

Institute of Medicine, Nursing Staff in Hospital and Nursing Homes: Is it Adequate? (1996)..... *passim*

Johnson, et. al. Quality of Care and Nursing Staff in Nursing Homes, IOM, Nursing Staff in Hospitals and Nursing Homes, 426 ..... 15, 16

Moniz, Too Few Staff, Too Much Risk, 61 RN 63 (Dec. 1998) 17

Maas, et. al. Nursing Staff and Quality of Care in Nursing Homes, IOM, Nursing Staff in Hospital and Nursing Homes: 361 .....6, 13, 15

Rogers, Nursing Injury, Stress and Nursing Care, IOM, Nursing Staff in Hospitals and Nursing Homes 503 14

Staiger et al., Expanding Career Opportunities for Women and the Declining Interest in Nursing as a Career, 18 Nursing Economics 230-236 15

Stricklan, et. al, Characteristics of Nursing Staff in Long-Term Care Facilities: Their Training, Experience and Perceived Proficiency Levels, 36 Nursing Homes 22 (Jan/Feb. 1987) 16

Workplace Injuries and Illnesses in 1997, BLS New Release, Dec. 17, 1998 13

IN THE

Supreme Court of the United States

NO. 99-1815

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondent

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO,
Respondent/Intervenor.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AND UNITED FOOD AND COMMERCIAL WORKERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37(b), the Service Employees International Union (SEIU) respectfully moves

this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner National Labor Relation Board. The Solicitor General on behalf of the Board, and counsel for Respondent Kentucky State District Council of Carpenters, AFL-CIO, consent to the filing of this brief.[1] The consent of the attorney for Respondent Kentucky River Community Care, Inc. was requested but refused.

INTEREST OF THE AMICUS CURIAE

The Service Employees International Union (SEIU), the American Federation of Teachers (AFT), the American Federation of State, County and Municipal Employees (AFSCME) and the United Food and Commerical Workers (UFCW) (jointly referenced hereafter as "Unions") are international labor organizations that jointly represent a substantial number of nurses working in hospitals and residential care facilities in the United States. The question this amicus brief addresses is whether the National Labor Relations Board reasonably determined that the term "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), does not encompass nurses who direct and assign work to other nursing staff in accordance with employer-specified standards, regulatory requirements and routine professional judgement.[2]

While the instant case focuses on six registered nurses working in a residential psychiatric facility, the question presented has broad implications within the nursing community. The Court's answer to this question portends to directly affect nurses who work in similarly situated residential and long-term care facilities. If the Court of Appeals' decision stands, a substantial percentage of nurses represented by the Unions will be at risk of losing the protections of the Act.

The Unions have prepared this amicus brief mindful of this Court's admonition that it should address relevant matter not already addressed by the parties. This brief accordingly seeks to inform the Court's consideration of the question presented by providing a fuller picture of what nurses do and the conditions under which they are employed when working in nursing homes and similar long-term care facilities, by referencing empirical studies, industry journals and applicable healthcare regulations.

Respectfully submitted,

DAVID J. STROM
STEPHANIE S. BAXTER
555 New Jersey Avenue, N.W.
Washington, DC 20001

Attorneys for the American Federation of Teacher's AFL-CIO

JACK DEMPSEY
LARRY WEINBERG
MARGARET MCCANN
1108 17th Street, N.W.
Washington, DC 20006

Attorneys for American Federation Municipal and County Employees, AFL-CIO

JUDITH A. SCOTT *
DIANA O. CERESI
1313 L Street, N.W.
Washington, DC 20005
(202) 898-3455

Attorneys for Service Employees International Union

ROBERT E. FUNK, JR.
1775 K Street, N.W.,
Washington, DC 20006

Attorney for United Food & Commercial Workers, AFL-CIO

* Counsel of Record

---

[1] These letters of consent have been filed with the Clerk of this Court.

[2] We limit ourselves to this question (the first presented by the Board's Petition), and defer to the Board, whose position we fully support, to address the remaining two questions presented.

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AND UNITED FOOD AND COMMERCIAL WORKERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37(b).[1]

INTEREST OF THE AMICUS CURIAE

The Service Employees International Union, AFL-CIO ("SEIU") is an international labor organization with a membership of 1.4 million working men and women. Approximately 710,000 SEIU members are healthcare workers—a number that includes 115,000 nurses—employed in hospitals, nursing homes, and other residential care facilities throughout the United States.

The American Federation of Teachers, AFL-CIO ("AFT") is an international labor organization that represents over 1.1 million members who work in public elementary and secondary schools, community colleges and universities, state government and health care. AFT has a significant and long-standing interest in the issues raised in this case concerning nurses and other health care employees.

The American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME") is a labor organization representing approximately 1.5 million working men and

---

[1] Counsel for a party did not author this brief in whole or part and no person or entity other than *amicus curiae* contributed monetarily to the preparation or submission of this brief.

women throughout the United States, Puerto Rico, and Panama. AFSCME is the voice for approximately 360,000 health care employees, 76,000 of whom are nurses. Throughout the country, AFSCME develops, initiates, assists, and defends litigation in state and federal courts as well as before administrative agencies addressing questions of workers' rights.

The United Food and Commercial Workers International Union, AFL-CIO, CLC ("UFCW") is a labor organization of 1.4 million members, representing workers across the United States in the meat packing and other food processing, supermarket and other retail, nursing home, hospital, and other healthcare, and insurance industries. The UFCW believes that the National Labor Relations Act (NLRA) should be construed broadly in order to protect the employee status, with its concomitant rights, of workers who perform hands-on, prescribed duties and are in no practical sense employer surrogates. The UFCW is therefore deeply concerned that the NLRA definition of employee not be artificially interpreted so that workers forfeit federal labor rights.

SUMMARY OF ARGUMENT

As of the latest figures, there are approximately 333,500 nurses working in the nursing home industry. The majority are employed as staff nurses, providing direct, hands-on care to nursing home residents. They are responsible for performing a wide range of nursing care activities from updating records, to performing medical procedures and inserting intravenous lines, to dispensing medications, to giving therapeutic massages, to assisting with basic daily living functions such as eating and dressing. The work these nurses do is low-paid and stressful. Their workplace also has one of the highest injury and illness rates in the nation. As a result, there are chronic staff shortages and a high turnover

among staff nurses. This, in turn, significantly impacts patient care.

To exclude staff nurses from the protections of the National Labor Relations Act, which affirmance of the decision below would do, would contravene Congress' intent as described in this Court's decision in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Thus, Congress in enacting the 1974 health care amendments to the Act, and extending the protections of the Act to healthcare workers generally, expressly recognized that "wages were low and working conditions poor in the health-care industry, . . . that as a result, employee morale was low and employment turnover high" and that "the extension of organizational and collective bargaining rights would ameliorate these conditions and elevate the standard of patient care." *Id.* at 497-98. These are precisely the conditions that exist for staff nurses in nursing homes. For this reason, this Court should carefully scrutinize the Sixth Circuit's decision which threatens to sweep *all* such nurses outside the protections of the Act.

ARGUMENT

A. INTRODUCTION

This case presents the question of whether the term "supervisor" in Section 2(11) of the National Labor Relations Act, 29 U.S. C. § 151(11), encompasses nurses who direct or assign work to less-skilled nursing staff. While the instant case focuses on six registered nurses ("RNs") working in a residential psychiatric facility, the issue resonates broadly within the nursing community. A decision here is likely to impact nurses who work not only in psychiatric facilities but also in nursing homes and other residential care facilities.

In this regard, we note that the vast majority of the cases that have reached the Circuit Courts on the supervisory status of nurses have involved licensed practical nurses ("LPNs")

working in nursing homes.[2] And, while the instant case involves registered nurses (RNs), the Sixth Circuit, which decided the case presently before the Court, has denied enforcement of NLRB orders in *every single case* involving nursing home nurses that has come before it since this Court's decision in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), ruling each time that the nurses at issue—whether RNs, LPNs or both—are supervisors who fall outside the protection of the National Labor Relations Act. The type of limited authority to assign and direct that the Sixth Circuit finds sufficient to render the RNs to be supervisors in this case is the same as that exercised in typical nursing homes by staff nurses, both RNs and LPNs, with respect to nurse aides. The result, in the words of one Sixth Circuit jurist, is that "as a practical matter, we have made it impossible for nurses to form collective bargaining units in nursing homes." *Integrated Health Services v. NLRB*, 191 F.3d at 713 (J. Jones concurring).[3]

---

[2] *See* e.g. *Beverly Enterprises v. NLRB*, 129 F.3d 1269 (D.C.Cir. 1997); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999); *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2d Cir. 2000); *NLRB v. Attleboro Assoc.*, 176 F.3d 154 (3d Cir. 1999); *Beverly Enterprises v. NLRB*, 165 F.3d 290 (4th Cir. 1999); *Beverly Enterprises v. NLRB*, 165 F.3d 307 (4th Cir. 1999)(en banc); *Integrated Health Services v. NLRB*, 191 F.3d 703 (6th Cir. 1999); *Mid-America Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998); *Grancare, Inc. v. NLRB*, 137 F.3d 372 (6th Cir. 1998)(en banc); *Caremore v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *NLRB v. Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999); *Beverly Enterprises v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Northern Montana Health Care Ctr v. NLRB*, 178 F.3d 1089 (9th Cir. 1999).

[3] *See Manor West, Inc. v. NLRB*, 60 F.3d 1195 (6th Cir. 1995); *Caremore v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *Grancare, Inc. v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *MidAmerica Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998); *Edgewood Nursing Center v. NLRB*, 142 F.3d 433 (Table), 1998 U.S. App. LEXIS 3151 (6th Cir. 1998)(unpublished); *NLRB v. Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999); *Beverly Health & Rehabilitation Services, Inc., v. NLRB*, 181 F.3d 99, 1999 U.S. App. LEXIS 8395 (6th Cir. 1999) *(unpublished); Rehabilitation & Healthcare Center, Inc., v.* NLRB, 178 F.3d 1296 (Table), 1999 U.S. App. LEXIS 5878 (6th Cir. 1999)(unpublished). *See also Beverly California v. NLRB*, 970 F.2d 1548 (6th Cir. 1992); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987).

The briefs of the parties to this case necessarily will focus on the RNs at issue here. In addition, it is our understanding that the American Nurses Association is filing a brief as amicus curiae that addresses the situation of RNs generally. In order to provide the Court with a more complete picture of the residential care nurses at issue in the majority of decided cases, and to avoid burdening the Court with a repetitious presentation of materials covered in other briefs, this brief focuses on the situation of LPNs in residential long-term care facilities.

B. THE ROLE OF STAFF NURSES IN NURSING HOMES

1. General Demographics

There are approximately 17,000 nursing homes in the United States, which range in size from small facilities with fewer than 50 beds to larger ones with over 200 beds. *HCFA, Rep. to Congress: Appropriateness of Minimum Staffing Ratios in Nursing Homes*, 2-1, (Summer 2000) (hereafter referenced as *"HCFA Report"*); C. Gabrel, *An Overview of Nursing Home Facilities: Data from the 1997 National Nursing Home Survey*, in *Advance Data from Vital and Health Statistics (National Center for Health Statistics, DHHS Pub. No. (PHS) 2000-1250, No. 311, 2000)*, (hereafter *"1997 National Nursing Home Survey"*). Most nursing home facilities are "private, profit-making organizations that are increasingly part of multi-organizational systems and investor-owned corporations." C. Harrington, *Nursing Facility Quality, Staffing, and Economic Issues, in* Institute of

Medicine, *Nursing Staff in Hospitals and Nursing Homes: Is It Adequate*? 493 (Academy Press 1996) [latter hereafter referenced as "*IOM Study*"].[4]

Under federal law, each nursing home must have at least one licensed nurse on duty 24 hours a day. 42 U.S.C. §1396r(b)(4)(c); 42 CFR §483.30. As of the latest studies, there are approximately 333,500 nurses working in the nursing home industry, a figure that includes both RNs and LPNs. *1997 National Nursing Home Survey* at 8. In general, the majority of staff nurses in nursing homes are LPNs. *Id.* RNs who serve as staff nurses in nursing homes, however, generally work interchangeably with LPNs. *HCFA Study* at 5-30 to 5-31 and App. B3. *See Mid-America Care Foundation v. NLRB*, 148 F.3d 638, 639 (6th Cir. 1998)(noting that from employer's perspective "there appears to be no distinction between the duties of registered nurses and LPNs; most internal documents refer to registered nurses and LPNs interchangeably as "nurses.")

LPN training generally consists of a one-year program administered through a technical or vocational school. *IOM Study* at 76-77; BLS, *Occupational Outlook Handbook* 227 (BLS 2000-01) {www.bls.gov}.[5] LPNs are trained in basic

---

[4] In 1994, Congress directed the Secretary of the Department of Health and Human Services to ask the Institute of Medicine ("IOM") of the National Academy of Sciences to undertake a study to determine whether and to what extent there is a need to increase the number of nurses in hospitals and nursing homes to promote the quality of patient care. The IOM Study is the report issued by the committee of experts appointed to research this issue. Appended to the Report are the statistical resources and the background papers commissioned by the committee.

[5] RNs working in nursing homes generally have two-year associate college degrees. *IOM Study* at 78; Maas et al., *Nurse Staff and Quality of Care in Nursing Homes, in IOM Study* at 396-97.

nursing concepts and patient care related subjects in order to perform basic bedside care. BLS, *Occupational Classification System Manual* {www.bls.gov}. Over 95% of LPNs are women and over 16% are African American. D. Himmelstein and S. Woolhandler, *Medical Care and Employment in the United States, 1968 to 1993, in Health Policy: Crisis and Reform in the U.S. Health Care Delivery System*, 182 (Harrington and Estes, eds., 3d ed. 2001). A majority of newly licensed LPNs begin their careers in long-term care facilities. *IOM Study* at 78.

2. Staff Nurses in Nursing Homes are Direct Care Providers

Nursing care is not limited to handing out medicines and taking temperatures, but covers the entire spectrum of care from assessing resident health status and updating records to providing wound care, performing medical treatments and monitoring intravenous procedures, to meeting the residents' basic physical needs such as assisting with bathing and eating, emptying bedpans, providing emotional support, and giving massages. In the words of a widely respected nurse advocate, each of these aspects of nursing, weaves "a tapestry of care, knowledge, relationship and trust that is critical to patients' survival." S. Gordon, *Life Support: Three Nurses in the Front Lines* 12, 17 (Little, Brown & Co. 1997).

As reflected in a leading treatise on nursing home administration, nursing staff is tasked with:

- providing nursing care to patients/residents as ordered by the physician
- completing the Minimum Data Set, any required protocols triggered by the Minimum Data Set, creating and implementing and updating the comprehensive plan of care
- administering medications to the patients/residents
- keeping patient records

- monitoring patients/residents for changes in condition and notifying the responsible physician—in short, serving as the physician's eyes and ears on a 24-hour basis
- achieving optimal quality of care and quality of life for patients/residents
- making certain that every patient/resident is functioning at the highest possible level
- playing a coordinating role with other staff (e.g. ensuring that planned physical therapy, activities, physician office visits and the like take place)

J. Allen, *Nursing Home Administration*, (3d ed. 1997). This accords with the description of standard LPN duties found in the BLS Occupational Handbook:

> They take vital signs such as temperature, blood pressure, pulse, and respiration. They also treat bedsores, prepare and give injections and enemas, apply dressings, give alcoholic rubs and massages, apply ice packs and hot water bottles, and insert catheters. LPNs observe patients and report adverse reactions to medications or treatments. They collect samples from patients for testing, perform routine laboratory tests, feed them, and record food and liquid intake and output. They help patients with bathing, dressing, and personal hygiene, keep them comfortable, and care for their emotional needs . . . .

BLS Occupational Outlook Handboook, supra at 227.

A review of the case law confirms this portrayal as typical of staff nurses' duties in nursing homes. Thus, the courts have been in general agreement with the observation that:

> [the] LPNs' duties primarily relate to direct patient care including: dispensing medication, performing supplemental feedings, assisting regular feedings, checking room conditions, ensuring that residents are clean, dry, and regularly turned, charting vital signs, noting residents' intake and output, and reporting patient conditions at the end of the shift.

Glenmark Assoc. v. NLRB, 147 F.3d 333, 336 (4th Cir. 1998). *Accord*: *Schnurmacher Nursing Home v. NLRB*, 214 F.3d at 263 (nurses are "responsible for providing necessary patient care, including the administration of medicine and medical treatments, bathing, dressing, grooming, and other assistance with daily living."); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d at 138 (nurses "provide both nursing care and general assistance with residents' daily activities."); *Beverly Enterprises v. NLRB* 165 F.3d at 302 n. 4 (Phillips, J., dissenting) (nurses "spend the vast majority of their time on duty doing exactly what the [assistants] do—directly attending to patients' basic medical and personal hygiene needs"); *Beverly Enterprises v. NLRB* 129 F.3d at 1270 ("LPNs pass medication, perform treatments on patients, stock the medical supply cart, complete paperwork and patient assessments, and accompany doctors on rounds"); *Rest Haven Living Ctr., Inc.*, 322 N.L.R.B. 210, 153 L.R.R.M. 1132, 1133 (1996) ("approximately 90 percent of [the nurse's] job consisted of caring for the residents of the nursing home").

Indeed, even the Sixth Circuit acknowledges that providing direct care is the principal duty of staff nurses in nursing homes. *See* e.g. *Caremore, Inc. v. NLRB*, 129 F.3d at 367 (nurses "spent the majority of their time on direct patient care."); *Beverly Health & Rehabilitation Service, Inc. v. NLRB*, 1999 U.S. App. LEXIS 8395 at *3 (nurses "spend the majority of their working time on direct patient care…[they] make rounds of the residents in their assigned wings and perform patient assessments, dispense medications, provide treatments, take vital signs, and observe any changes in the residents' medical status."); *Edgewood Nursing Ctr., Inc. v.*

NLRB, 1998 U.S. App. LEXIS 3151 at *5 (nurses "spent a substantial amount of work time performing 'hands on' resident care").

3. Staff Scheduling in Nursing Homes.

Every nursing home receiving federal Medicare or state Medicaid funds is required by law to have a RN on staff who serves as a full-time Director of Nursing ("DON"). 42 CFR § 483.30. DONs generally have the principal responsibility for making staffing and scheduling decisions. As noted in the HCFA report (at 5-24):

> The staffing process is directed primarily by the DON, the ADON [assistant DON], or the scheduler, whose responsibilities usually include supervising the staffing process, allocating staff, or adjusting staffing. Input by other nursing staff is generally limited, and made only in terms of requesting vacation or leave. Eight out of ten facilities interviewed use a scheduler (also called the Staffing Coordinator). The Staffing Coordinator could be the DON who is ultimately responsible for the scheduling process. In about half of the facilities, the scheduler is responsible for scheduling both licensed and unlicensed staff. In the other facilities, the DON is responsible for scheduling the licensed staff (RNs, LPNs) while the scheduler is responsible for unlicensed staff (nurse aides).

And, to the extent that the DON delegates these scheduling tasks, the HCFA report also makes it clear that such duties are clerical or ministerial in nature:

> Oftentimes, the scheduler position is a clerical staff position located within the administrative offices, and the scheduler assists with payroll or other administrative tasks as time permits. Across the facilities, schedulers work between 16 and 40 hours per week on staffing related activities. The scheduler is usually responsible for receiving call-outs and filling vacancies as needed. To fill vacancies, facility staff are usually the first to be contacted (i.e. overtime for staff) and agency staff are used as a last resort. Facilities prefer to use per diem staff (regular staff) rather than agency staff to fill vacancies, but per diem staff usually are not available.

HCFA Report at 5-25. Staff scheduling systems typically employ weekly or bi-weekly master schedules, which take into account "resident census, informal measures of resident acuity, shift, and consideration for a State-mandated minimum staffing standard." *HCFA Report* at 5-24.[6]

In 1997, most nursing homes had a FTE nursing staff ratio of 8.8 RNs, 11.9 LPNs and 38.3 nurse aides per 100 residents. *HCFA Report* at 3-14, n.24. *See also 1997 National Nursing Home Survey* at 3, 8. A more recent study indicates that in 1998, the average number of nursing staff hours per resident day was: .6 for RNs, .6 for LPNs and 2 for aides. C. Harrington, H. Carrillo, S. Thollaug, P. Summers and V. Wellin, *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 1992 Through 1998*, 55 Gerontology (Sept. 2000), *also in* M. Dellefield, *The Relationship Between Nurse Staffing in Nursing Homes and Quality Indicators: A Literature Review*, *J. of Gerontology* 14, 18 (June 2000). This ratio of 1.2 nurses[7] to 2 aides parallels the ratios reflected in the cases that have come before the Courts of Appeals. *See, e.g., Integrated Health Services v. NLRB*, 191 F.3d at 713 (40 nurses: 40-50 aides); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d at 148 (17 nurses: 30 aides); *GranCare, Inc. v. NLRB*, 170 F.3d at 667 (59 nurses:90 aides); *Beverly*

---

[6] Thirty-seven states mandate minimum staffing ratios for nursing homes. Some of these are premised on hours of nursing care per resident per day while others use the ratio of staff members to residents. *HCFA Report* at 2-19 to 20.

[7] Excluding DONs and Assistant DONs.

Enterprises v. NLRB, 148 F.3d at 1047-48 (18 nurses: 28 aides).

In light of the above, it is apparent that classifying all RNs and LPNs working in nursing homes as supervisors—as the Sixth Circuit and other Circuits have done—creates an unreasonable ratio of supervisors to supervised. *See, e.g.*, *Beverly Enterprises v. NLRB*, 165 F.3d at 302 (10 supervisors: 21 employees); *Beverly Enterprises v. NLRB*, 165 F.3d at 309 (30 supervisors: 50-60 employees); *Glenmark Assoc. v. NLRB*, 147 F.3d at 335 (26 supervisors: 58 employees). While the Act does not include the ratio of supervisors to supervised among the criteria for assessing statutory supervisor status, as the Seventh Circuit aptly observed, a "highly improbable ratio of bosses to drones 'raises a warning flag.'" *NLRB v. GranCare*, 170 F.3d at 667, quoting *NLRB v. American Med. Services, Inc.*, 705 F.2d 1427, 1473 (7th Cir. 1983).[8]

In the instant case, for example, if the RNs are deemed to be supervisors based on their routine direction of LPNs (which, as noted, parallels the routine direction of aides by RNs and LPNs in nursing homes) the ratio will be seven nurse-supervisors (i.e. the Nurse Coordinator and the six RNs) to three nurse-employees. If the Sixth Circuit's analysis is adopted, the result using the nationwide ratios of 1.2 nurses to 2 aides, will be to exempt almost 40% of patient care staff working in nursing homes from the protections of the Act. *NLRB v. GranCare*, 170 F.3d at 667.

---

[8] In nursing home cases, the Board has found a 1:2 ratio of supervisors to supervised to be "an unusually high ratio." *National G. South, Inc.*, 230 NLRB 976, 979 (1977). Even a lesser ratio of one supervisor to three employees is an "unrealistic and excessively high ratio." *Airkaman, Inc.*, 230 NLRB 924, 926 (1977). *See* also *Beverly Enterprises*, 148 F.3d at 1047.

4. Staff Nurses are Poorly Compensated and Work Under Difficult Conditions

"Unfortunately, caring for the elderly is still not considered prestigious or financially rewarding when compared to other areas of nursing practice." Maas, *Nursing Staff and Quality of Care , supra*, at 369. As a result, the wages and benefits of nursing personnel in nursing homes traditionally have been "scandalously low." C. Harrington, *Wages & Benefits of Nursing Personnel in Nursing Homes*, 8 *Nursing Economics* 378 (1990). *See* also C. Harrington, *Nursing Facility Quality, Staffing and Economic Issues, supra* at 466.

In 1999, LPN wages in nursing homes averaged $13 per hour or about $27,000 a year. S. Adler, *Contemporary's 1999 Nursing and Administrative Salary Survey, Contemporary Long Term Care,* {www.cltcmag.com.}; *BLS Occupational Outlook Handbook, supra*, at 228. Moreover, most nursing home facilities do not provide health benefits for staff. *IOM Study* at 160; Harrington, *Nursing Facility Quality, Staffing and Economic Issues, supra* at 466.

Meanwhile, these staff nurses work in an industry that is ranked as one of the highest for employee injury and illness rates. The overall rate of injury and illness in nursing and personal care facilities between 1995 and 1998 (the latest year for which data was available) ranged from 18.2 to 14.2 per 100 full-time workers, as compared with the average private industry rate of 8.1 to 6.7 during that same period. BLS, *Occupational Injuries and Illnesses: Industry Data (1989-current)* {www.bls.gov.} Put in further perspective, the injury and illness rate among nursing home staff is higher than that in coal mining (9.1–8.2), construction (10.6–8.8), manufacturing (11.6–9.7), transportation (9.1–7.3), auto repair (6.6–5.1), hospitals (10.1–9.2) and, even, professional sports (16.1–12.4) *Id. See also, Workplace Injuries and Illnesses in 1997*, BLS New Release, Dec. 17, 1998. While

the rate of occupational injury and illness in private industry as a whole has remained constant or declined slightly since 1980, the rate for nursing homes has increased by over 60%. *IOM Study* at 170.

"[O]verexertion, being struck by an object, and falls to the same level are the leading ways in which workers are hurt on the job....Workers in nursing and personal care facilities had the highest rate of injuries among all private industries due to overexertion or falling to the same level (BLS, 1995b)." *IOM Study* at 170-71. Nursing staff in nursing homes "by the very nature of their work" are also "particularly vulnerable to the hazards of back injuries and associated pain." *Id.* at 173. Indeed, the BLS handbook openly warns that:

> L.P.N.s may face hazards from caustic chemicals, radiation, and infectious diseases such as hepatitis. They are subject to back injuries when moving patients and shock from electrical equipment. They often must deal with the stress of heavy workloads. In addition, the patients they care for may be confused, irrational, agitated, or uncooperative.

BLS Occupational Outlook Occupational Handbook at 227. Accord: *IOM Study* at 173-187 (noting that staff are particularly susceptible to back injuries, needlestick injuries, workplace related violence, physical aggression from residents, and work-related stress); B. Rogers, *Nursing Injury, Stress, and Nursing Care, in IOM Study* at 503-519 (same).

As one of the commissioned papers for the IOM Study further observed:

> Nursing home work is often difficult, stressful, frustrating and labor intensive. . . . Nursing home staff has to confront aging, disability, and dying. Much of the care of the elderly is not pleasant, such as caring for urinary and bowel incontinence or dealing with

> a cognitively impaired elder who is agitated and combative. Combined with low wages, minimal benefits, hard physical work, and often progressively deteriorating abilities of the residents, the nature of the work for nursing staff is often characterized as tedious, unpleasant, and unrewarding. Furthermore, because concern for costs is likely to continue while resident acuity increases, the workload for [aides] and nurses in nursing homes may very well get heavier.

Maas, *Nursing Staff and Quality of Care in Nursing Homes*, *supra* at 370.

Chronic staff shortages and high turnover are endemic in the industry, which only adds to the level of frustration and stress experienced by staff nurses. *HCFA Report* at 6-30; Harrington, *Wages & Benefits of Nursing Personnel in Nursing Homes*, *supra* at 379 (approximately 60% of nursing homes reported one or more vacancies for both RNs and LPNs). With fewer women going into this traditionally female-dominated workforce, this high vacancy rate can be expected to continue. Staiger *et al.*, *Expanding Career Opportunities for Women and the Declining Interest in Nursing as a Career*, 18 Nursing Economics 230-236 (noting that "only half as many women [are] entering nursing today as compared to 25 years ago.").

The combination of low wages, high stress, workplace injuries, and chronic understaffing, in turn, creates high turnover rates among nursing staff. The average turnover rate for RNs and LPNs working in nursing homes in 1994 was 56.3% and 52.5%, respectively. *IOM Study* at 160, Table 6.5; J. Johnson, M. Cowles, S. Simmens, *Quality of Care and Nursing Staff*, *IOM Study* at 430. Another study of nursing homes further found that the average tenure for RNs and LPNs was 1.5 years. *P. Stricklan, V. Einhorn,* C. Jones, *Characteristics of Nursing Staff in Long-Term Care*

Facilities: Their Training, Experience and Perceived Proficiency Levels, 36 *Nursing Homes* 22, 25 (Jan./Feb. 1987). *See also*, Harrington, *Nursing Facility Quality, Staffing and Economic Issues*, *supra*, at 466-67.

5. Working Conditions and Quality of Care

Nursing staff shortages in nursing homes impact not only the nursing staff but also the quality of care received by the residents. "High turnover rates and short employment periods for nursing staff, particularly in nursing homes are considered detrimental to patients and patient care." Stricklan, *Characteristics of Nursing Staff in Long-Term Care Facilities: Their Training, Experience and Perceived Proficiency Levels*, *supra* at 25. Turnover is "a major problem in continuity of care, which is an important factor in providing good care to residents with chronic conditions. Disruption of staff leads to residents having to constantly 'train' staff, problems in carrying through care plans, inaccurate assessments because of failure to be familiar with the baselines status of a resident, and failure of a facility to fully develop a philosophy of caring." J. Johnson, M. Cowles, S. Simmens, *Quality of Care and Nursing Staff in Nursing Homes, in Nursing Staff in Hospitals and Nursing Homes, IOM Study* at 430. The committee of experts appointed by the Institute of Medicine to investigate the issue similarly concluded that "[t]he preponderance of evidence from a number of studies using different types of quality measures has show a positive relationship between nursing staff levels and quality of nursing home care, indicating a strong need to increase the overall level of nursing staff in nursing homes." *IOM Study* at 153.

A telling reflection of what happens when there is a shortage of nursing staff was described in the HCFA Report. As one nursing home resident interviewed for the report explained: "[there is a] chronic staff shortage of nurses and

CNAs [i.e. certified nursing assistants]. [The] nurses have to help the CNAs and everyone does a job they aren't hired for." According to this same resident, with only one nurse available to administer medications, there were times when he got his medications up to a "couple of hours" late. *HCFA Report* at 4-19. At another facility described in the report "records showed that there was only one licensed nurse and one nurse aide on duty for the entire night shift to care for 41 and 45 residents, respectively." *Id.* at 4-23.

Wages, benefits, work hours, workplace health and safety protections, and staffing levels are all mandatory bargaining subjects which have been addressed beneficially in collective bargaining between employers and labor organizations for years. *See e.g.* D. Moniz, *Too Few Staff, Too Much Risk; Nurses in Facilities Lacking Staff Support*, 61 RN 63 (Dec. 1998) ("In the workplace, nursing unions have negotiated contacts that specify nurse-to-patient ratios and that allow members to actively participate in staffing decisions."); Gordon, *Life Support*, *supra* at 13 (noting that staff nurses and other health care workers under union contracts earn more than their non-union counterparts). Denying staff nurses the ability to exercise the NLRA's "fundamental right to organize and bargain collectively" is wholly unwarranted and can be expected to have wide-ranging consequences both for these dedicated and hardworking employees and for the broader public concerned with quality health care.

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 497 (1978), this Court described Congress' intent in extending the protections of the Act to employees of health-care institutions. "Congress found that wages were low and working conditions poor in the health-care industry, and that as a result, employee morale was low and employment turnover high." Accordingly, "Congress determined that the extension of organizational and collective-bargaining rights

would ameliorate these conditions and elevate the standard of patient care." *Id.* at 497-98.

Unfortunately, as we have shown above, poor working conditions still exist in today's nursing homes. Decisions like that of the Court of Appeals in this case stand as an obstacle to the attainment of Congress' objective to "ameliorate these conditions and elevate the standard of patient care." *Id.*

CONCLUSION

This Court should reverse the decision of the Court of Appeals and affirm the Board's reasonable construction of the Act to protect the nurses at issue.

Respectfully submitted,

DAVID J. STROM
STEPHANIE S. BAXTER
555 New Jersey Avenue, N.W.
Washington, DC 20001

Attornes for the American Federation of Teacher's AFL-CIO

JACK DEMPSEY
LARRY WEINBERG
MARGARET MCCANN
1108 17th Street, N.W.
Washington, DC
Attorneys for American Federation Municipal and County Employees, AFL-CIO

JUDITH A. SCOTT *
DIANA O. CERESI
1313 L Street, N.W.
Washington, DC 20005
(202) 898-3455

Attorneys for Service Employees International Union

ROBERT E. FUNK, JR.
1775 K Street, N.W.,
Washington, DC 20006

Attorney for United Food & Commercial Workers, AFL-CIO

* Counsel of Record

MOTION FILED
NOV 17 2000

(1) NOV 17 2000

No. 99-1815

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMERICAN NURSES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BARBARA J. SAPIN
Counsel of Record
General Counsel
AMERICAN NURSES ASSOCIATION
600 Maryland Avenue, S.W.
Washington, DC 20024
(202) 651-7127

Of Counsel:

WOODY N. PETERSON
2101 L Street, N.W.
Washington, DC 20037

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

IN THE

Supreme Court of the United States

No. 99-1815

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AMERICAN NURSES ASSOCIATION IN SUPPORT OF PETITIONER

The American Nurses Association ("ANA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner National Labor Relations Board. The Solicitor General on behalf of the Board, and counsel for Respondent Kentucky State District Council of Carpenters, AFL-CIO, consent to the filing of this brief.[1] The consent of the attorney for Respondent Kentucky River Community Care, Inc. was requested but refused.

[1] These letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

ANA is a national labor organization through the United American Nurses (ANA's collective bargaining structure) and a federation of 54 state and territorial constituent associations with over 200,000 registered nurse members. The question ANA's brief addresses is whether the National Labor Relations Board reasonably determined that when a professional employee, such as a registered nurse, exercises ordinary professional judgment in accordance with employer-specified standards and the employee's special professional competence and licensure, the professional does not thereby exercise the sort of "independent judgment" that would make the professional a "supervisor" under Section 2(11) of the National Labor Relations Act ("Act"), 29 U.S.C. § 152(11).[2]

The Court's answer to this question will directly affect the registered nurse members of ANA who exercise their professional judgment in the course of delivering skilled nursing services to patients. If the court of appeals' decision stands, almost all of the registered nurses represented by ANA's constituent organizations will be at risk of losing the protection of the Act.

ANA filed an *amicus curiae* brief with this Court in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), that addressed the § 2(11) questions there presented with respect to registered nurses. The brief ANA requests permission to file here would, we submit, be of equal assistance to the Court in deciding the related, but distinct, Section 2(11) issue before the Court in this case, that likewise involves the profession of registered nursing.

---

[2] We limit ourselves to this question (the first presented by the Board's Petition), and leave it to the Board, whose position we fully support, to address the remaining two questions presented.

Consistent with ANA's identity as an organization composed solely of registered nurses and devoted exclusively to their profession, ANA's brief concentrates on the profession of registered nursing. The brief places particular emphasis on the source materials (such as state nurse practice acts, hospital organization and protocols, and scholarly literature) that confirm that the registered nurse's exercise of independent judgment is (1) a function of the registered nurse's professional knowledge, license and state regulation, and not of front-line management prerogatives bestowed by any given employer, and (2) circumscribed by standards imposed by law, regulation and the hospital itself.

Respectfully submitted,

BARBARA J. SAPIN
Counsel of Record
General Counsel
AMERICAN NURSES ASSOCIATION
600 Maryland Avenue, S.W.
Washington, DC 20024
(202) 651-7127

Of Counsel:

WOODY N. PETERSON
2101 L Street, N.W.
Washington, DC 20037

November 2000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. WHEN AN RN'S EXERCISE OF INDEPENDENT JUDGMENT IN DIRECTING WORK IS A FUNCTION OF HER EXPERTISE, RATHER THAN FRONT-LINE MANAGEMENT PREROGATIVES, IT IS NOT § 2(11) SUPERVISION	2
A. State Nurse Practice Acts	2
B. The Profession	7
II. REGISTERED NURSES' EXERCISE OF "INDEPENDENT JUDGMENT" IS CIRCUMSCRIBED BY STATE, FEDERAL AND HOSPITAL LAW AND REGULATION	9
A. State Law	10
B. Federal Regulations And Hospital Protocols	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Beverly Enters. v. NLRB, 148 F.3d 1042 (8th Cir. 1998) 13
Beverly Enterprises–Pennsylvania, Inc. v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997) 9
NLRB v. GranCare, Inc., 170 F.3d 662 (7th Cir. 1999) 7
NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571 (1994) 2
NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) 2

STATUTES, RULES AND REGULATIONS

National Labor Relations Act, 29 U.S.C. § 152(11) ..... *passim*
42 C.F.R. § 482.23(a) 12
42 C.F.R. § 488.5 12
Ala. Code § 34-21-1(3) 3
Alaska Stat. § 08.68.100(a)(9) 3
Ariz. Rev. Stat. § 32-1601(10)-(11) 3
Colo. Rev. Stat. § 12-38-103(9)-(10) 3
Colo. Rev. Stat. § 12-38-132 4
Del. Code Ann. tit. 24, § 1902(b) 3
Del. Code Ann. tit. 24, § 1902(b)(7) 4
Fla. Admin. Code Ann. r. 59A-3.2085(5)(d) 10
Fla. Admin. Code Ann. r. 59A-3.2085(5)(f) 5
Fla. Stat. Ann. § 400.23 5
Haw. Rev. Stat. Ann. § 457-2 4
Ind. Code Ann. § 25-23-1-1.1(b)(7) 4
Kan. Admin. Regs. 28-34-7 5
Kan. Admin. Regs. 28-34-55 10
Ky. Rev. Stat. Ann. § 314.011(2) 6
Ky. Rev. Stat. Ann. § 314.011(6)(d) 3
La. Rev. Stat. Ann. § 37:913(14)(f) 6
Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D) 4, 6

TABLE OF AUTHORITIES—Continued

Page

Md. Code Ann., Health Occ. § 8-101(a)(iv) 4
Mass. Ann. Laws ch. 112, § 80B 6
Mich. Comp. Laws § 333.16104(1) 6
Mich. Comp. Laws § 333.17201(c) 3
Minn. R. 4640.0900 ..... 5, 10
Minn. Stat. § 148.171(14) 3
Minn. Stat. § 148.171(15) 3, 4
Miss. Code Ann. § 73-15-5(2)-(3) 3, 4
Mont. Code Ann. § 37-8-102(5)(a) 3
Mont. Code Ann. § 37-8-102(5)(b) 3, 4
Neb. Rev. Stat. § 71-1, 132.05(8) 3, 4
Neb. Rev. Stat. § 71-1, 132.05(9) 3
N.H. Rev. Stat. Ann. § 326-B:2(XVI), (XVII), (XVIII) 3
N.H. Rev. Stat. Ann. § 326-B:2(XVIII)(d) 4
N.J. Stat. Ann. § 45:11-23(1)(b) 3
N.M. Stat. Ann. § 61-3-3(J)(8) 4
N.Y. Comp. Codes R. & Regs. tit. 10, § 405.5 5
N.C. Gen. Stat. § 90-171.20(7)(d) 4
N.C. Gen. Stat. § 90-181.20(8)(c) 6
N.D. Cent. Code § 43-12.1-02(6)(d) 4
Ohio Rev. Code Ann. § 4723.02(B)(6) 3
Okla. Stat. tit. 59, § 567.3a 6
Okla. Stat. tit. 59, § 567.3a(3)(g) 4
28 Pa. Code § 109.4 5
28 Pa. Code § 109.6 11
28 Pa. Code § 109.21 10
28 Pa. Code § 109.23(b) 11
S.C. Code Ann. § 40-33-10(g)-(h) 3
S.D. Codified Laws Ann. § 36-9-3(2) 4
22 Tex. Admin. Code § 218 6
Utah Admin. Code R432-100-12 10
Utah Code Ann. § 58-31b-102(10)(g) 4

TABLE OF AUTHORITIES—Continued

	Page
Vt. Stat. Ann. tit. 26, § 1572(2)(G)	4
Wash. Rev. Code § 18.79.040(1)(c)	4
Wash. Rev. Code § 18.135.026(6)	6
Wis. Stat. § 441.11(4)	4
Wyo. Stat. Ann. § 33-21-120(a)(ix)	4
Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900 (1988)	3
Mem. Mich. Att'y Gen., *Delegation and Supervision Under the Public Health Code* (Oct. 27, 1982)	7
1981 Op. Att'y Gen. Fla. 171, 1981 Fla. AG LEXIS 44 (1981)	6
Op. Kan. Att'y Gen. No. 91-45 (1991), 1991 Kan. AG LEXIS 45 (1991)	6
Alaska Board of Nursing, Position Statement Regarding Delegation by Nurses of Nursing Tasks to Unlicensed Assistive Staff of Assisted Living Homes (June 2, 1995)	4
Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII (1992)	
Rule 2	4
Rule 3.3	6
Georgia Board of Nursing, Policy Statement: Assignment to Unlicensed Assistive Personnel (2000)	4
Georgia Board of Nursing: Standards of Registered Professional Nursing Practice, Amended, Chapter 410-11, 410-11-.01(2) (2000)	4
Maryland Board of Nursing, Declaratory Ruling 92-1 (1992)	4

TABLE OF AUTHORITIES—Continued

	Page
Oregon Board of Nursing, Standards for Registered Nurse Delegation of Nursing Care Tasks to Unlicensed Persons in Settings Where Registered Nurses Are Not Regularly Scheduled, Rule 851-47-010	6
Joint Commission on Accreditation of Healthcare Organizations 2000 Automated Accreditation Manual for Hospitals Updates (2000)	
Intent of LD.2.1 Through LD.2.10	13
Intent of NR.2 Through NR.4	12
Standards on Care of Patients: Overview	13
Standard LD.2.3	13
Standard LD.2.4	13
Standard LD.2.5	13
Standard NR.2	12
Standard NR.3	12
Standard and Intent of PE.4.3	12
MISCELLANEOUS	
Carol M. Boston, MSN, RN, *Nurse Assistive Programs*, 20 JONA 5 (1990)	8
Joan L. Creasia & Barbara Parker, *Conceptual Foundations of Professional Nursing Practice* (1991)	9
Illustrated Manual of Nursing Practice (1991)	9
Fred D. Jung, PhD, RN, *Teaching Registered Nurses How to Supervise Nursing Assistants*, 21 JONA 32 (1991)	8
Lucie Young Kelly, R.N., Ph.D., F.A.A.N. & Lucille A. Joel, R.N., Ed.D., F.A.A.N., *Dimensions of Professional Nursing* (1995)	9

TABLE OF AUTHORITIES—Continued

	Page
Susan M. Kennerly, RN, PhD, CCRN, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective*, 16(5) Focus on Critical Care 364 (1989)	5
Barbara Kozier, et al., *Introduction to Nursing* (1989)	9
Susan Kun Leddy, R.N., Ph.D., *Conceptual Bases of Professional Nursing* (1998)	7, 8
Barbara W. Narrow & Kay Brown Buschle, *Fundamentals of Nursing Practice* (1987)	9
Patricia A. Potter, RN, MSN & Anne Griffin Perry, RN, MSN, EdD, *Basic Nursing: A Critical Thinking Approach* (1999)	9
Richard Strichartz, *Commentary on the Michigan Public Health Code* (Health Code Implementation Project) (1982)	6
Sister Patricia A. Sullivan, RSM, ScD, RN & Reverend Timothy Brown, SJ, JD, *Unlicensed Persons in Patient Care Settings: Administrative, Policy, and Ethical Issues*, 24 Nursing Clinics of North America 557 (1989)	7, 8

IN THE

Supreme Court of the United States

No. 99-1815

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN NURSES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is filed contingent upon the grant of the foregoing motion for leave to file the brief. The interest of the American Nurses Association ("ANA") is set forth in that motion.[1]

[1] In accordance with Rule 37.6 of the Rules of this Court, ANA states that its counsel authored this brief in whole, and that no person or entity, other than ANA, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

To the extent an exercise by a registered nurse ("RN") of independent judgment in overseeing the work of less-skilled employees arises from the nurse's professional authority, the exercise of such authority does not constitute § 2(11) "independent judgment" in "the exercise of" one of the enumerated Section 2(11) powers. Moreover, insofar as the exercise of an RN's authority is confined by federal guidelines, state regulations and hospital policies, protocols and management directives, such exercise must be considered "routine or clerical," within the meaning of § 2(11).

ARGUMENT

I. WHEN AN RN'S EXERCISE OF INDEPENDENT JUDGMENT IN DIRECTING WORK IS A FUNCTION OF HER EXPERTISE, RATHER THAN FRONT-LINE MANAGEMENT PREROGATIVES, IT IS NOT § 2(11) SUPERVISION

It is within "the scope of the duties routinely performed by similarly situated professionals" (*NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980)) for registered nurses in providing patient care to exercise their "professional knowledge" (*NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583 (1994)) by directing the activities of less-skilled health care workers. In what follows, we demonstrate that a nurse's authority in this regard derives from state nurse practice acts, regulations of state boards of nursing, her professional license and her nursing training, and not from "front-line management prerogatives" (*Health Care*, 511 U.S. at 583) conferred by her employer.

A. State Nurse Practice Acts

Nursing practice is regulated and controlled by the states through their state nurse practice acts, which nurses "are

required to follow." Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,912 (1988).[2] These acts recognize the professional registered nurse's role in a state's health care delivery system and generally establish statutory nursing practice definitions consistent with current and prospective nursing practice. Nurse practice acts also generally differentiate the duties of registered professional nurses from those of less-skilled health care workers such as licensed practical nurses, nursing aides or assistants.[3] It is these statutes (and not employers) that confer on a registered nurse the authority to carry out her professional responsibilities in a health care facility.

Numerous states' definitions of the nurse as a professional similarly provide that the nurse's scope of practice "includes the teaching, direction, and supervision of less skilled personnel in the performance of delegated nursing activities." Mich. Comp. Laws § 333.17201(c); *see also* Ky. Rev. Stat. Ann. § 314.011(6)(d) ("'Registered nursing practice'" is "the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill," including "[t]he supervision, teaching of, and delegation to other personnel in the performance of activities relating to nursing care."); Ohio Rev. Code Ann. § 4723.02(B)(6) ("'Practice of nursing as a registered nurse'" encompasses the provision of nursing care requiring "specialized knowledge, judgment, and skill," and

---

[2] Authority to issue licenses, rules, regulations and advisory opinions under these acts typically rests with the state boards of nursing. *See, e.g.*, Alaska Stat. § 08.68.100(a)(9).

[3] *See* Ala. Code § 34-21-1(3); Ariz. Rev. Stat. § 32-1601(10)-(11); Colo. Rev. Stat. § 12-38-103(9)-(10); Del. Code Ann. tit. 24, § 1902(b); Minn. Stat. § 148.171(14)-(15); Miss. Code Ann. § 73-15-5(2)-(3); Mont. Code Ann. § 37-8-102(5)(a)-(b); Neb. Rev. Stat. § 71-1, 132.05(8)-(9); N.H. Rev. Stat. Ann. § 326-B:2(XVI), (XVII), (XVIII); N.J. Stat. Ann. § 45:11-23(1)(b); S.C. Code Ann. § 40-33-10(g)-(h).

specifically, "[t]eaching, administering, supervising, delegating, and evaluating nursing practice.").[4]

Many state boards of nursing have issued regulations and opinions that are to the same effect. *See, e.g.*, Alaska Board of Nursing, Position Statement Regarding Delegation by Nurses of Nursing Tasks to Unlicensed Assistive Staff of Assisted Living Homes (June 2, 1995) ("Delegation of some nursing activities is a legally accepted part of nursing practice."); Maryland Board of Nursing, Declaratory Ruling 92-1 (1992) ("The Board of Nursing considers it within the scope of practice of a licensed nurse to delegate selected nursing tasks to unlicensed personnel . . . ."); Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 (1992) ("Supervision of personnel associated with nursing functions is included in the legal definition of the practice of professional nursing."); Georgia Board of Nursing, Policy Statement: Assignment to Unlicensed Assistive Personnel (2000) ("Registered nurses have always utilized unlicensed individuals to assist in the provision of nursing care."); Georgia Board of Nursing: Standards of Registered Professional Nursing Practice, Amended, Chapter 410-11, 410-11-.01(2) (2000) ("[A]ssessment, nursing diagnosis, planning, intervention, evaluation, teaching, and supervision

[4] *See also* Colo. Rev. Stat. § 12-38-132; Del. Code Ann. tit. 24, § 1902(b)(7); Haw. Rev. Stat. Ann. § 457-2; Ind. Code Ann. § 25-23-1-1.1(b)(7); Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D); Md. Code Ann., Health Occ. § 8-101(a)(iv); Minn. Stat. § 148.171(15); Miss. Code Ann. § 73-15-5(2)-(3); Mont. Code Ann. § 37-8-102(5)(b); Neb. Rev. Stat. § 71-1, 132.05(8); N.H. Rev. Stat. Ann. § 326-B:2(XVIII)(d); N.M. Stat. Ann. § 61-3-3(J)(8); N.C. Gen. Stat. § 90-171.20(7)(d); N.D. Cent. Code § 43-12.1-02(6)(d); Okla. Stat. tit. 59, § 567.3a(3)(g); S.D. Codified Laws Ann. § 36-9-3(2); Utah Code Ann. § 58-31b-102(10)(g); Vt. Stat. Ann. tit. 26, § 1572(2)(G); Wash. Rev. Code § 18.79.040(1)(c); Wis. Stat. § 441.11(4); Wyo. Stat. Ann. § 33-21-120(a)(ix).

are the major responsibilities of the registered nurse in the practice of nursing.").[5]

Implicit in these regulatory definitions of nursing practice is the recognition that a registered professional nurse, in order to perform the duties and responsibilities that most state laws impose, must exercise ordinary professional judgment in directing the work of other registered professional nurses and less-skilled, nonprofessional health care employees. To this end, many states mandate that medical facilities provide

> [a] sufficient number of registered professional nurses . . . on duty at all times to plan, assign, supervise, and evaluate nursing care as well as to give patients such nursing care as requires the judgment and specialized skills of a registered nurse. A graduate nurse, or graduate practical nurse, providing care shall be under the supervision of a registered nurse.

28 Pa. Code § 109.4.[6]

The distinction between the authority bestowed on nurses by licensure and nurse practice acts to carry out their professional role, and the authority over personnel supervision conferred by an employer that falls within Section 2(11) of the Act, is further confirmed by many state statutes and accompanying regulations and interpretations. Thus, several states allow professional nurses to delegate only

[5] *See also* Susan M. Kennerly, RN, PhD, CCRN, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective*, 16(5) Focus on Critical Care 364, 367 (1989) ("Because . . . unlicensed individuals . . . function in a contributory nursing role that requires their reporting directly to nurses in the practice setting," the realities of a registered nurse's duties under the scope of professional nursing practice encompass the oversight and supervision of nursing assistants and aides.).

[6] *See also* Fla. Admin. Code Ann. r. 59A-3.2085(5)(f); Fla. Stat. Ann. § 400.23; Kan. Admin. Regs. 28-34-7; Minn. R. 4640.0900; N.Y. Comp. Codes R. & Regs. tit. 10, § 405.5.

"selected acts, tasks, or functions,"[7] "auxiliary services"[8] or "ministerial acts."[9] As one commentator has observed: "The concept of delegation enables others to perform *routine* activities so as to free the delegating health professional for more complex tasks."[10]

Accordingly, far from being "supervision" emblematic of a "front-line management prerogative," exercise of independent judgment in supervising registered professional nurses' aides is mandated by the state nurse practice acts as an adjunct to

[7] Mich. Comp. Laws § 333.16104(1). "'Delegation' means an authorization granted by a licensee to a licensed or unlicensed individual to perform selected acts, tasks, or functions *that fall within the scope of practice of the delegator* and that are not within the scope of practice of the delegatee and that, in the absence of the authorization, *would constitute illegal practice of a licensed profession.*" *Id.* (emphasis added); *see also* Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 3.3 (1992) ("'Delegation' means the assignment to a competent individual the authority to perform in a selected situation a selected nursing task included in the practice of professional nursing . . . ."); Ky. Rev. Stat. Ann. § 314.011(2); La. Rev. Stat. Ann. § 37:913(14)(f); Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D); Mass. Ann. Laws ch. 112, § 80B; N.C. Gen. Stat. § 90-181.20(8)(c); Okla. Stat. tit. 59, § 567.3a; Oregon Board of Nursing, Standards for Registered Nurse Delegation of Nursing Care Tasks to Unlicensed Persons in Settings Where Registered Nurses Are Not Regularly Scheduled, Rule 851-47-010; 22 Tex. Admin. Code § 218; Wash. Rev. Code § 18.135.026(6).

[8] Op. Kan. Att'y Gen. No. 91-45 (1991), 1991 Kan. AG LEXIS 45 (1991) (Auxiliary patient care services refer to acts which support or assist nursing services.).

[9] 1981 Op. Att'y Gen. Fla. 171, 1981 Fla. AG LEXIS 44 (1981) (registered nurses may delegate ministerial functions to nursing assistants so as to utilize the RNs' professional training).

[10] *See* Richard Strichartz, *Commentary on the Michigan Public Health Code* (Health Code Implementation Project) (1982) (emphasis added).

the delegation of supportive tasks.[11] In sum, when a nurse's authority derives from a source (such as her license or state regulation) other than her employer, the exercise of *that* authority is not § 2(11) supervision, as it does not derive from a *management* prerogative reserved to an employer.[12] *See NLRB v. GranCare, Inc.*, 170 F.3d 662, 668 (7th Cir. 1999) (The " 'judgment' " of licensed practical nurses "in exercising their incidental supervisory authority over" certified nursing assistants "is not the 'independent judgment' concerned with management prerogatives contemplated by § 2(11). Rather, it is more properly viewed as 'professional judgment' exercised in getting their assigned work done with the assistance of CNAs employed for that purpose.").

B. The Profession

As nursing scholarly literature, education and training make plain, the above distinction likewise lies at the core of nursing as a profession. Thus, while "[i]n most jobs, people who are responsible for the work of others have some say in their hiring, firing, and career/or job development," nurses "are expected to be responsible for the action of assistants over whom they have little, if any, control." Sister Patricia A.

[11] Mem. Mich. Att'y Gen., *Delegation and Supervision Under the Public Health Code* at 3 (Oct. 27, 1982) (Clear distinction exists between "the supervision which may occur in an employment/management situation" and "the supervision which is required to effectuate a legal delegation under the Code.").

[12] For example, an employer could not lawfully order a nurse to direct the work of a less-skilled employee in a manner inconsistent with a state nurse practice act, nor give a non-RN authority reserved to RNs by law. *See* Susan Kun Leddy, R.N., Ph.D., *Conceptual Bases of Professional Nursing* 445-46 (1998) ("The employer may suggest, but cannot decide, which nursing acts can safely be delegated and to whom." Hospital policies "'cannot override the law and rules of nursing and will not protect the nurse who is following policy but acting outside of the practice act.'" (citation omitted)).

Sullivan, RSM, ScD, RN & Reverend Timothy Brown, SJ, JD, *Unlicensed Persons in Patient Care Settings: Administrative, Policy, and Ethical Issues*, 24 Nursing Clinics of North America 557, 564 (1989). And, in directing nursing aides, "the RNs' focus [is] on the professional activities requiring their knowledge and skills." Fred D. Jung, PhD, RN, *Teaching Registered Nurses How to Supervise Nursing Assistants*, 21 JONA 32, 32 (1991).

Moreover, as authority that properly falls within the scope of professional nursing, "appropriate delegation" of those tasks "to unlicensed nursing personnel" is not a prerogative of management, but rather a means "to balance nursing supply and demand," thereby "facilitating *the RN's* availability for bedside nursing care. The ultimate goal, of course, is to *support the RN* and enhance nursing resources by effectively using assistive nursing personnel." Carol M. Boston, MSN, RN, *Nurse Assistive Programs*, 20 JONA 5, 6 (1990) (emphasis added). In many settings, nursing assistants are employed "to assure an environment in which nurses can most efficiently and effectively provide nursing care . . . [and are] *accountable to the head nurse* or a designate." Sullivan & Brown, 24 Nursing Clinics of North America at 559 (emphasis added); *see also* Leddy, *supra* note 12, at 445 ("A staff nurse delegates to get work accomplished in a timely manner." Given the increasing hospital use of aides, "delegation between nursing staff and assistants on the unit 'is the most significant aspect of delegation for the professional staff nurse.'" (citation omitted)).

Nursing students are taught this distinction as part of their training in working with and overseeing the work of less-skilled workers. As several basic nursing textbooks explain: "health care services in the hospital and other clinical settings will include much greater involvement of . . . ancillary personnel, such as health care assistants and nursing aides. While you'll still be accountable for the care of the patients

and their families, you'll also need to delegate many more activities." *Illustrated Manual of Nursing Practice* 7 (1991); *see also* Joan L. Creasia & Barbara Parker, *Conceptual Foundations of Professional Nursing Practice* 80 (1991); Lucie Young Kelly, R.N., Ph.D., F.A.A.N. & Lucille A. Joel, R.N., Ed.D., F.A.A.N., *Dimensions of Professional Nursing* 178 (1995).

Similarly, another basic nursing text describes the nurse's role in working with other health care personnel as an

> *interdependent professional relationship*[] [in which] the nurse delegates responsibilities and tasks to other people such as licensed practical nurses, orderlies, or nurse's aides. As a member of the health care team, the nurse is often expected to plan, lead, administer, delegate, organize, and coordinate. *Such activities are an essential part of nursing, but they are activities shared by many other professional people and are, therefore, not unique to nursing.*

Barbara W. Narrow & Kay Brown Buschle, *Fundamentals of Nursing Practice* 34 (1987) (emphasis added); *see also* Patricia A. Potter, RN, MSN & Anne Griffin Perry, RN, MSN, EdD, *Basic Nursing: A Critical Thinking Approach* 39 (1999); Barbara Kozier, et al., *Introduction to Nursing* 12 (1989).

II. REGISTERED NURSES' EXERCISE OF "INDEPENDENT JUDGMENT" IS CIRCUMSCRIBED BY STATE, FEDERAL AND HOSPITAL LAW AND REGULATION

Even those types of authority that fall within § 2(11) are supervisory *only* where their exercise involves independent judgment, and are not "routine or clerical" in nature. As the court held in *Beverly Enterprises–Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997):

> [T]he question of independent judgment under section 2(11) is one of the degree of discretion exercised with respect to the statutory indicia of supervisory status. If an individual's discretion with respect to assignment, discipline, or the other statutory factors is tightly constrained, then her exercise of that authority is "routine" and does not involve "independent judgment."

We show below that, although registered nurses may direct work, the judgment necessary to do so is often limited by mandates of state law, federal regulation and hospital protocols to the point where it becomes "routine or clerical" for § 2(11) purposes.

A. State Law

The registered nurse's judgment in directing the work of other members of the nursing staff is often severely limited by state statutes regulating health care facilities. These statutes in many cases require that the hospital or facility formulate specific policies and procedures related to nursing care and practice. For example, under the Florida Administrative Code, "[e]ach hospital shall develop written standards of nursing practice and related policies and procedures to define and describe the scope and conduct of patient care provided by the nursing staff." Fla. Admin. Code Ann. r. 59A-3.2085(5)(d). Similarly, under the Pennsylvania Administrative Code, "[w]ritten nursing care and administrative policies and procedures shall be developed to provide the nursing staff with methods of meeting its responsibilities and achieving goals." 28 Pa. Code § 109.21; *see also* Kan. Admin. Regs. 28-34-55; Minn. R. 4640.0900; Utah Admin. Code R432-100-12.

The policies and procedures required by state law are, in many cases, quite specific. For example, in Pennsylvania, the law requires hospitals to promulgate written procedures on matters ranging from standards of nursing practice to

scheduling of nursing staff. Thus, 28 Pa. Code § 109.23(b) provides that:

> Nursing care policies and procedures shall be consistent with professionally recognized standards of nursing practice . . . . These policies shall include procedures for the following:
>
> (1) Noting diagnostic and therapeutic orders.
>
> (2) Assigning the nursing care of patients.

Similarly, 28 Pa. Code § 109.6 states that:

> Staffing patterns should reflect consideration of nursing goals, standards of nursing practice, and the needs of the patients.
>
> (b) Staffing schedules shall accomplish the following:
>
> (1) Staffing patterns which reflect the quality and quantity of various categories of nursing personnel necessary to carry out the nursing care program.
>
> . . . .
>
> (3) The patient care assignment is commensurate with the qualifications of each nursing staff member, the identified nursing needs of the patient, and the prescribed medical regimen.

B. Federal Regulations And Hospital Protocols

The standards most hospitals must meet as a condition for participation in the federal Medicare program likewise sharply constrain the discretion of individual nurses to "direct" the work of others. In order to be eligible for Medicare payment, hospitals must satisfy the Conditions of Participation in the Medicare program promulgated by the federal Health Care Financing Administration ("HCFA"). As a condition of participation under HCFA,

> [t]he hospital must have a well-organized [nursing] service with a plan of administrative authority and

> delineation of responsibilities for patient care. The director of the nursing service must be a licensed registered nurse. He or she is responsible for the operation of the service, including determining the types and numbers of nursing personnel and staff necessary to provide nursing care for all areas of the hospital.

42 C.F.R. § 482.23(a).

Most hospitals qualify for participation in the Medicare program through voluntary accreditation by the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), a private body. Hospitals that are accredited by JCAHO are "deemed" by the federal government to have met HCFA's Medicare Conditions of Participation. *See, e.g.*, 42 C.F.R. § 488.5.

JCAHO Accreditation Standards mandate that hospital policies allow registered nurses to "determine and set priorities on a patient's nursing care needs." JCAHO 2000 Automated Accreditation Manual for Hospitals Updates (2000), Standard and Intent of PE.4.3. The activities of less-skilled assistants, "such as licensed practical nurses, licensed vocational nurses, mental health technicians, or nursing assistants . . . [must] comply with applicable laws and regulations and with hospital policies and procedures." *Id.* The JCAHO Standards further provide that "nursing policies, procedures, and standards describe and guide how the nursing staff provides the nursing care required." *Id.*, Intent of NR.2 Through NR.4. Notably, it is the *nurse executive* (also sometimes titled the Director of Nursing, Director of Patient Care Services, or Vice-President for Nursing) who "has the authority and responsibility for establishing standards of nursing practice." *Id.*, Standard NR.2. The "nurse executive, registered nurses, and other designated nursing staff members" may develop policies, procedures, nursing standards of patient care, and standards of nursing practice, but it is "the nurse executive or a designee(s)" who must approve them. *Id.*, Standard NR.3.

Moreover, it is hospital-generated guidelines which regulate the assignment of all nursing staff members to patient care responsibilities, tasks and functions. Thus, in planning and providing care to patients, "[e]ach provider's role and responsibility are determined by their professional skills, competence, and credentials; the care or rehabilitation being provided; hospital policies; and relevant licensure, certification, regulation, privileges, scope of practice, or job description." *Id.*, Standards on Care of Patients: Overview. It is "[t]he leaders of each department [who] make their human resources and other resource requirements known to the hospital." *Id.*, Intent of LD.2.1 Through LD.2.10. As with other nursing policies, procedures and standards, it is the hospital directors who "develop and implement policies and procedures that guide and support the provision of services" (*id.*, Standard LD.2.3); "recommend a sufficient number of qualified and competent persons to provide care" (*id.*, Standard LD.2.4); and "determine the qualifications and competence of department personnel who provide patient care services" (*id.*, Standard LD.2.5).

In sum, *all* nursing staff—registered nurses, licensed practical nurses, vocational nurses and unlicensed nursing personnel such as nursing assistants—function under written, institution-specific guidelines which are prepared by, or under the direct authority of, the nurse executive. Accordingly, the scope of any "independent judgment" exercised by one member of the nursing staff in directing the work of another is so sharply constrained by these hospital-generated guidelines, that it is "routine" within the meaning of § 2(11). *See Beverly Enters. v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998) ("to the extent that the nurses assign and direct, such authority does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies, and protocols regarding patient care").

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BARBARA J. SAPIN
Counsel of Record
General Counsel
AMERICAN NURSES ASSOCIATION
600 Maryland Avenue, S.W.
Washington, DC 20024
(202) 651-7127

Of Counsel:

WOODY N. PETERSON
2101 L Street, N.W.
Washington, DC 20037

November 2000

Dec 22, 2000

Supreme Court, U.S.
FILED
DEC 22 2000
OFFICE OF THE CLERK

No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND AMERICAN SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

G. ROGER KING
Counsel Of Record
JEFFREY D. WINCHESTER
E. MICHAEL ROSSMAN
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3939

Counsel for *Amici Curiae*

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF AMICI INTEREST 1

INTRODUCTION AND SUMMARY 1

ARGUMENT 5

I. NURSES INCREASINGLY PERFORM CRITICAL SUPERVISORY FUNCTIONS RELATED TO THE PROVISION OF PATIENT CARE THAT REQUIRE INDEPENDENT JUDGMENT 5

A. MANY NURSES ENGAGE IN THE SUPERVISORY FUNCTIONS LISTED IN § 2(11) OF THE NLRA 5

B. INCREASING DEMAND FOR NURSING SERVICES, DECREASING NUMBERS OF NURSES, AND MOUNTING ECONOMIC PRESSURES REQUIRE EMPLOYERS TO DEPEND UPON NURSES' SUPERVISORY POWERS 8

C. ENSURING TO EMPLOYERS LOYALTY OF NURSE-SUPERVISORS IS CRUCIAL TO THE HEALTH OF THE HEALTH CARE INDUSTRY 16

II. THE BOARD'S DETERMINATION THAT NURSE SUPERVISORY ACTS BASED UPON JUDGMENTS INFORMED BY PROFESSIONAL KNOWLEDGE, SKILL, OR EXPERIENCE DO NOT MEET THE "INDEPENDENT JUDGMENT" REQUIREMENT OF SECTION 2(11) OF THE NLRA IS IN ERROR 19

A. THE TEXT OF SECTION 2(11) DOES NOT SUPPORT THE BOARD'S CONCLUSION . 19

B. THE BOARD'S INTERPRETATION OF INDEPENDENT JUDGMENT RENDERS OTHER PORTIONS OF SECTION 2(11) MEANINGLESS 21

C. THE BOARD'S INTERPRETATION OF INDEPENDENT JUDGMENT IS NOT NECESSARY TO RESOLVE "TENSION" BETWEEN SECTIONS 2(11) AND 2(12) . . . 24

D. THE LEGISLATIVE HISTORY OF SECTION 2(11) DOES NOT SUPPORT THE BOARD'S CONCLUSION 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 21
Avon Convalescent Ctr., 200 N.L.R.B. 702 (1972) 22
Beverly Cal. Corp. v. NLRB, 970 F.2d 1548 (6th Cir. 1992) 6
Beverly Enters.--Ohio D/B/A Nothcrest Nursing Home, 313 N.L.R.B. 491 (1993) 22
Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290 (4th Cir. 1999) 22
Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1977) . . 2
Elmhurst Extended Care Facilities, 329 NLRB No. 55, 1999 WL 801516 (Sept. 30, 1999) 19,20
Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719 (7th Cir. 2000) 24
Florida Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641, 417 U.S. 790 (1974) 2,16,17,24
Gahm v. Thomas Jefferson Univ. Hosp., No. Civ. A-94-2050, 2000 WL 233247 (E.D. Pa. Feb. 29, 2000) 18
Glenmark Assocs. v. NLRB, 147 F.3d 333 (4th Cir. 1998) 7,23,24
Grancare, Inc. v. NLRB, 137 F.3d 372 (6th Cir. 1998) 23,24
Greater Dallas Home Care Alliance v. United States, 10 F. Supp.2d 638 (N.D. Tex. 1998) 11
Integrated Health Servs. of Mich, Inc. v. NLRB, 191 F.3d 703 (6th Cir. 1999) 2
Loyalhanna Health Care Assocs., 332 N.L.R.B. No. 86, 2000 WL 1670884 (Oct. 30, 2000) 19

TABLE OF AUTHORITIES (cont.'d)

Page

Manor West, Inc. v. NLRB, 60 F.3d 1195 (6th Cir. 1995) 10
Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347 (1st Cir. 1980) 7
McClatchy Newspaper, 321 N.L.R.B. 1386, *enf'd* 131 F.3d 1026 (D.C. Cir. 1997) 4
Mid-America Care Found. v. NLRB, 148 F.3d 638 (1998) 21
NLRB v. Attleboro Assocs., Inc., 176 F.3d 154 (3d Cir. 1999) 3,22,23,25
NLRB v. Health Care & Ret. Corp., 511 U.S. 571 (1994) ..... passim
NLRB v. McCullough Envtl. Servs., 5 F.3d 923 (5th Cir. 1993) 7
NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4th Cir. 1982) 23
NLRB v. Swift & Co., 292 F.2d 561 (1st Cir. 1961) 28
NLRB v. Winnebago Television Corp., 75 F.3d 1208 (7th Cir. 1996) 17,23
Providence Hosp., 320 N.L.R.B. 717 (1996) .. 19,20,25,26
Rockville Nursing Ctr., 193 NLRB 959 (1971) 22
Schnuck Mkts., Inc. v. NLRB, 961 F.2d 700 (8th Cir. 1992) 23,24
Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2nd Cir. 2000) 22,25
Southern Bleachery & Print Works, Inc., 115 N.L.R.B. 787 (1956) 28
Spontenbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2d Cir. 1997) 7,23
Sun Refining & Mktg. Cos., 301 N.L.R.B. 642 (1991) ... 7
Thompson v. Nason Hosp., 527 Pa. 330; 591 A.2d 703 (1991) 18,19

TABLE OF AUTHORITIES (cont.'d)

Page

Vencor Hosp.-Los Angeles, 328 N.L.R.B. No. 167, 1999 WL 606678 (Aug. 5, 1999) 20
Vermont Assembly of Home Health Agencies v. Shalala, 18 F. Supp. 2d 355 (D. Vt. 1998) 11

Statutes and Regulations

29 U.S.C. § 152(11) ..... passim
42 U.S.C.A. § 1395u 11
Ky. Rev. Stat. Ann. § 314.011 6
201 Ky. Admin. Regs. 20:400 6
201 Ky. Admin. Regs. 20:400(3)(2) 6
201 Ky. Admin. Regs. 20:400(4)(1) 6
201 Ky. Admin. Regs. 20:400(4)(2) 6

Congressional History

93 Cong. Rec. 3952 (daily ed. April 23, 1947) 17
93 Cong. Rec. 4804 (daily ed. May 7, 1947 27,29
H.R. Rep No. 80-245 (1947) 17
S. Rep. No. 80-105 (1947) 17

Miscellaneous

American Health Care Association, Facts and Trends: The Nursing Facility Source Book viii (1999) 21
American Hospital Association, Trends Affecting Hospitals and Health Systems (2000) 9
American Nursing Association, *1999 House of Delegates Summary of Proceedings—Examining the Nursing Workforce*, *at* http://www.nursingworld.org/about/summary/sum99/worcforc.htm (last visited Dec. 6, 2000) 8

TABLE OF AUTHORITIES (cont.'d)

Page

Robert H. Binstock, *Symposium, Public Policies on Aging in the Twenty-First Century*, 9 Stan. L.&Pol'y Rev. 311 (1998) 14
Rodger Doyle, *Health Care Costs*, Scientific American, (Apr. 1999) 10
John Easton, *Teaching Hospitals Feel the Side Effects of Budget Care*, Univ. of Chicago Magazine (June 1999), *available at* http://www.uchicago.edu/alumni.mag/ index.html ... 12
Another Nursing Home Chain Files for Bankruptcy Protection, Fox Market Wire Jan. 18, 2000, *at* http://www.foxmarketwire.com/wires/ 0118f_ap_0118_2.sml (last visited Dec. 18, 2000) ... 12
Avram Goldstein, *Proposal Could End Walkout by D.C. Nurses*, Washington Post, November 7, 2000 14
Health Care Costs Threaten Middle Class, at http://www.americashealth.org/middle.html (last visited Dec. 7, 2000) 10
Iowa Nurses' Ass'n., *Nurses and EMS Personnel: Collaboration, Delegation and Accountability*, http://www.iowanurses.org/nurseems.htm (last visited Dec. 7, 2000) 3,5
Mary Chris Jaklevic and Ed Lovern, *A Nursing Code Blue: Few Easy Solutions Seen for a National RN Shortage That's Different from Prior Undersupplies*, Modern Healthcare, Dec. 11, 2000, *available at* http://www.modernhealthcare.com/ currentissue/topten.php3?refid=6320&db=mh99up& published=200121 (last visited Dec. 16, 2000) 9
David Kelly, *Health Care Workers Strike at 18 Hospitals, Demand Increases in Pay Labor*, L.A. Times, December 15, 2000 14

TABLE OF AUTHORITIES (cont.'d)

Page

G. Roger King, *Where Have All the Supervisors Gone? -- The Board's Misdiagnosis of Health Care & Retirement Corp.*, 13 Labor Law. 343 (1997) 10
Robert Kuttner, *The American Health Care System—Wall Street and Health Care*, The New England Journal of Medicine (Feb. 25, 1999), available at http://www.nejm.org/content/1999/ 0340/0008/0664.asp (last visited Dec. 18, 2000) .. 11,12
Wilma B. Leibman & Peter J. Hurtgen, *The Clinton Board(s)—A Partial Look From Within*, 16 Lab. Law. 43 (2000) 23
Long-term Care: Experts Recommend Minimum Nurse Staffing Standards for U.S. Nursing Homes, at http://www.ahcpr.gov/research/jun00/ 0600RA14.htm (last visited Dec. 7, 2000) 5,6
J. Duncan Moore Jr., *Survey: Nation Facing Shortage of Key Health Personnel Rather Than Predicted Surplus*, HealthLeaders.com, *at* http://www.healthleaders.com/index.cfm? sections+9&screen=news&news_id=9922 (last visited Dec. 13, 2000) 10
Jonathan Edward Motley, *Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home*, 73 Ind. L. J. 711 (1998) 6
Jeff Myers, *Staff Shortage Makes Hard Job More Difficult, Nurses Say*, Press Republican Online, Oct. 29, 2000, at http://www.pressrepublican.com/ Archive/2000/10_2000/102920002.html (last visited Dec. 18, 2000) 14

TABLE OF AUTHORITIES (cont.'d)

Page

National Health Care Cost & Quality Assoc., *California Long Term Acute Care Hospital System Jettisons in-House Physician Coverage in Favor of Nurse Practitioner Program*, The NHCQA Bulletin, May 5, 2000, *available at* http://www.nhcqa.org/bul2,4.html (last visited Dec. 18, 2000) 15

Nat'l Ass'n for Hospice Care, *1999 NAHC Legislative Blueprint for Action*, L112, http://www.nahc.org/NAHC/LegReg/99bp/legblue4.html (last visited Dec. 7, 2000) 5

North Carolina Nurses Ass'n, *RN Education*, *at* http://www.ncnurses.org/rneducation.htm (last visited Dec. 7, 2000) 5

Office of News and Public Information, *Hospitals and Nursing Homes Need Changes in Mix of Nursing Personnel*, Jan. 8, 1996, *at* http://www.nationalacademies .org/ onpi/pr/jan96/nurse.html last visited Dec. 12, 2000) 14,15

Press Release, *Penn Health Statement* (May 25, 1999), *available at* http://www.upenn.edu/almanac/between/ PHEALTH-layoffs.html (last visited Dec. 18, 2000) 13

Jeanne Schulte Scott, *BBA Bad News Gets Worse, Thanks to Flawed Calculations: Effects of the Balanced Budget Act of 1997 - An Error of 76 Percent in Favor of Medicare*, in Healthcare Financial Management (Sept. 1, 1999) 11

Paul L. Schibetta, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends Upon the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025 (1990) 18

TABLE OF AUTHORITIES (cont.'d)

Page

Gary Shepard, *Number of Hospitals Falls to Record Lows*, Local Business.Com, November 9, 2000 *at* http://www.localbusiness.com/Story/0,118,DDT_501167,00.html (last visited Dec. 18, 2000) 12

Bruce Siegel, *Public Hospitals—A Prescription for Survival*, The Commonwealth Fund, October, 1996, *at* http://www.cmwt.org/programs/minority/siegel.asp#abstract (last visited Dec. 19, 2000) 10

Kerry Smith, *Back to School: Kaiser Offers Nurses a Chance to Study for BSN and Stay in the Workplace*, Nurseweek (July 20, 1998), *available at* http://www.nurseweek.com/features/98-7/school.html 16

Jennifer Stewart, *USHC Workers Brace for Layoffs*, The Stanford Daily (March 10, 1999), *available at* http://daily.stanford.org/Daily98-99/3-10-1999/news/NEWushc10.html (last visited Dec. 18, 2000) 13

Steve Strunsky, *For Hospital and H.M.O., a Parting of the Ways*, N.Y. Times (Jan. 2, 2000) 11

Webster's New International Dictionary of the English Language, Vol. II, 1262 (1939) 20

STATEMENT OF *AMICI* INTEREST[1]

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than one hundred fifty thousand (150,000) professional and student members throughout the world. Of these 150,000 members, 9,116 self-identify as members of the health care field. The American Society for Healthcare Human Resources Administration ("ASHHRA") consists of over 3,000 members, and is the only membership organization in the United States dedicated exclusively to the field of professional health care human resources management. ASHHRA leads and serves by providing its members with information, education and legal and professional updates. The instant matter is of interest to SHRM and ASHHRA because both believe that the National Labor Relations Board's ("Board's") application of 29 U.S.C. § 152(11) [hereinafter "Section 2(11)"] in nurse-supervisor cases is an incorrect interpretation of the National Labor Relations Act ("NLRA" or "Act") that has, and will continue to, negatively affect the provision of health care in this country.

INTRODUCTION AND SUMMARY

The instant matter involves important public policy issues regarding the structure of the nation's health care delivery system and an important statutory construction question under the Act. In a series of recent cases involving the question of whether nurses are supervisors under the NLRA, the Board has misapplied the Act's definition of supervisor. Under Section 2(11), an employee is a supervisor if 1) he or she has the

---

[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no other person other than the named *Amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

authority to engage in one of twelve statutorily stated activities; 2) the employee exercises such authority in the interests of the employer; and 3) the exercise of the employee's authority is not routine or clerical but involves the use of independent judgment. In nurse-supervisor cases the Board has interpreted and applied this definition in such a manner as to deny nurses Section 2(11) supervisor status as a matter of course, to extend coverage of the Act beyond the limits defined by Congress, and in a manner that will adversely impact the ability of health care providers to effectively deliver quality care to patients.

SHRM and ASHHRA respectfully request that this Court, as it did in *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571 (1994) (hereinafter *HCR*), affirm the United States Court of Appeals for the Sixth Circuit's correction of the Board's "'unique' misapprehension of the manner in which § 2(11) applies to nurses." *Integrated Health Servs. of Mich., Inc. v. NLRB*, 191 F.3d 703, 707 (6th Cir. 1999) (citing *Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997)). As this Court has recognized, Congress enacted Section 2(11) to ensure to employers the complete loyalty of those employees who serve as supervisors. *See Florida Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 807 (1974). Congress considered such loyalty essential to maintain the balance of power in the workplace between unions and employers. *See id.* at 811. Congress' concern in this regard is no less applicable in the health care context. Indeed, as this court recognized in *HCR*, "the statute gives a nursing home the ability to insist on the individual loyalty of its nurses" when such nurses act as supervisors. *HCR*, 511 U.S. at 580-81.

Notwithstanding the policies behind Section 2(11), the Board's current approach to the section routinely denies nurses supervisor status, despite the fact that in today's nursing-home environment, as well as in other aspects of the health care industry, many nurses are employed in roles that require the

continual exercise of independent judgment in a variety of supervisory tasks that are critical to the provision of quality care.[2] Indeed, many of these supervisory judgments dramatically affect the health status of patients, and may even involve matters of life or death. Nurses in various health care settings give minute-to-minute, let alone hourly or daily, supervisory instructions to other nurses, technical employees, aides, orderlies, and clerical employees.[3] The nature of this decisionmaking is as varied and complex as is the often-changing nature of a patient's medical condition. Indeed, in light of these workplace realities, SHRM and ASHHRA submit that the Board's current application of Section 2(11) in nurse-supervisor cases cannot be squared with the language, purpose, or history of the section.

The Board's approach in this area also represents poor public policy. If the Board's present approach with respect to the classification of nurse supervisors is left unchecked, long-term-care facilities and acute-care hospitals will not have a sufficient number of supervisory nurses to effectively and

---

[2] SHRM and ASHHRA acknowledge that the determination of supervisory status under Section 2(11) requires, among other things, a detailed application of the facts of a particular case to the applicable statutory criteria. Thus, SHRM and ASHHRA do not ask this Court to announce a per se rule defining which classification of nurses are supervisors for the purposes of the NLRA. Nevertheless, as was recognized recently by the United States Court of Appeals for the Third Circuit, and is detailed in this brief, "similar organizational structures exist throughout the nursing home industry." *NLRB v. Attleboro Assocs.*, 176 F.3d 154, 163 (3d Cir. 1999)

[3] Iowa Nurses' Ass'n, *Nurses and EMS Personnel: Collaboration, Delegation and Accountability*, http://www.iowanurses.org/nurseems.htm (last visited Dec. 7, 2000); Agency for Healthcare Research And Quality, *Long-Term Care: Experts Recommend Minimum Nurse Staffing Standards for U.S. Nursing Homes*, at http://www.ahcpr.gov.research/jun00/0600ra14.htm (last visited Dec. 21, 2000)

efficiently manage and direct the delivery of many health care services. The impact of the Board's approach will be particularly difficult for health care providers, given the cost-containment pressures that increasingly are placed upon such institutions. Establishment of innovative managerial structures with appropriate nurse supervisory models is critical to the development of a more efficient health care delivery system. However, by routinely denying nurse supervisors Section 2(11) supervisory status—and thus permitting the unionization of such nurse supervisors—the Board's approach to Section 2(11) severely compromises the health care employer's ability to select, control, compensate[4] and ensure the ultimate loyalty of such individuals.

The critical irony and end point of the Board's approach to the instant issue is that under federal labor law, Section 2(11) supervisory status will be more easily and more frequently established in virtually any industry other than health care—although it is in health care, however, where the lack of appropriate nurse supervision can result in the loss of life or long-term, severe medical consequences for the patient and corresponding significant financial liability for the employer.

[4] This is particularly true in the area of incentive and merit compensation. *See McClatchy Newspaper*, 321 N.L.R.B. 1386 (1996), enf'd 131 F.3d 1026 (D.C. Cir. 1997).

ARGUMENT

I. NURSES INCREASINGLY PERFORM CRITICAL SUPERVISORY FUNCTIONS RELATED TO THE PROVISION OF PATIENT CARE THAT REQUIRE INDEPENDENT JUDGMENT.

A. MANY NURSES ENGAGE IN THE SUPERVISORY FUNCTIONS LISTED IN § 2(11) OF THE NLRA.

It is beyond question that many nurses in today's health care workplace exercise significant supervisory responsibilities. RN duty and job descriptions aptly illustrate this point. According to the North Carolina Nurses Association, it is the RN's job to "direct and supervise nursing support personnel such as LPNs." North Carolina Nurses Ass'n, *RN Education, at* http://www.ncnurses.org/ rneducation.htm (last visited Dec. 7, 2000). For instance, in the field of emergency care, it is well established that "'[a]ll non-RN caregivers, involved in providing nursing care . . . [are] directly supervised by and responsible to professional emergency registered nurses."[5] In the area of home-based health care, federal Medicare regulations permit LPNs to provide nursing services in patients' homes, *but only* so long as LPNs, and any unlicensed aides, are "under the general supervision of registered nurses." Nat'l Ass'n for Hospice Care, *1999 NAHC Legislative Blueprint for Action*, L112 *at* http://www.nahc.org/NAHC/LegReg/99bp/legblue4.html (last visited Dec. 7, 2000). Finally, in the nursing home area, RNs typically act as on-site administrators. *See Long-Term Care: Experts Recommend Minimum Nurse Staffing Standards for U.S. Nursing Homes, supra*, note 2. "Although the exact job

[5] Iowa Nurses' Ass'n, *Nurses and EMS Personnel: Collaboration, Delegation and Accountability, at* http://www.iowanurses.org/ nurseems.htm (last visited Dec. 7, 2000).

titles vary from facility to facility, the primary hierarchy for nursing homes is: RNs serving administrative and management roles, LPNs serving combined roles as charge and treatment nurses, and CNAs working under the direction of LPNs, taking care of the residents' basic daily needs." Jonathan Edward Motley, Note, *Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home*, 73 Ind. L. J. 711, 717-18 (1998).

The descriptions from all of the various nursing fields demonstrate one common theme: that many nurses shoulder the authority and responsibility for supervising other nurses and non-licensed health care personnel. Health care employers hire nurses, not merely to act as conduits for the dictates of protocols and procedures, but rather to exercise independent judgment in numerous respects, including the supervision of other employees.[6] *See Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992) ("It is perfectly obvious that the

[6] In Kentucky, the site of the instant case, the ability of a Registered Nurse or a Licenced Practical Nurse to delegate nursing tasks to assistants is governed by statute and administrative regulation. *See* Ky. Rev. Stat. Ann. § 314.011; 201 Ky. Admin. Regs. 20:400. These provisions belie the notion that such delegation does not involve the use of supervisory authority or independent judgment, at least under conventional and commonly accepted definitions of these terms. As an initial matter, no delegation of nursing tasks may take place under Kentucky regulation(s) without a determination by the delegator that the task can be competently and safely performed by the delegatee, without compromising the patient's welfare. *See* 201 Ky. Admin. Regs. 20:400(3)(2). Furthermore, 201 Ky. Admin. Regs. 20:400(4)(1) specifically provides that such delegation may occur only if the delegating nurse provides "supervision" to the delegatee. The degree of supervision required is a matter for the delegating nurse, who is required to evaluate factors such as: 1) the stability of the patient's condition; 2) the training and competency of the delegatee; 3) the complexity of the nursing task being delegated; 4) the proximity and availability of the delegator to the delegatee. *See* 201 Ky. Admin. Regs. 20:400(4)(2).

kind of judgment exercised by registered nurses in directing. . . nurse's aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not 'merely routine.'").[7] The unpredictability and varied nature of the health care profession—and thus the varied circumstances under which nurses labor—belies any generalized attempt to label a nurse's exercise of supervisory authority routine.[8]

[7] Indeed, the mishandling of a nurse's supervisory tasks could have dire consequences for patients and corresponding significant malpractice liability for the employer in question. Courts have recognized that when disastrous consequences could result from the mishandling of employee oversight responsibilities, such responsibilities cannot simply be swept aside as routine or clerical. *See, e.g. Spontenbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491 (2d Cir. 1997); *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923, 941-42 (5th Cir. 1993); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 356-57 (1st Cir. 1980).

[8] It should be noted that both the Board and the Courts have held that complex tasks, even if performed over and over, are not necessarily "routine" for the purposes of Section 2(11). *See Glenmark Assocs. v. NLRB*, 147 F.3d 333, 341 (4th Cir. 1998) ("The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think."). For instance, in *Spontenbush*, 106 F.3d at 491-92, a case involving the supervisory status of barge captains, the United States Court of Appeals for the Second Circuit cited *Sun Refining & Mktg. Cos.*, 301 N.L.R.B. 642, 649 (1991) for the proposition that:

> . . . even if a particular operation is performed again and again, it does not necessarily follow that it is routine. . . . Constant monitoring and accountability is essential. Otherwise repetitive operations must be performed under constantly changing conditions which significantly vary the individual components of the operation and the order and the manner in which they are performed. Mistakes can and do result in disastrous consequences . . . .

B. INCREASING DEMAND FOR NURSING SERVICES, DECREASING NUMBERS OF NURSES, AND MOUNTING ECONOMIC PRESSURES REQUIRE EMPLOYERS TO DEPEND UPON NURSES' SUPERVISORY POWERS.

Several factors affecting today's health care employers mandate increasing reliance on nurse supervisors by health care employers. As an initial matter, the demand for nursing services is increasing in the United States at a time in which the supply of nurses is decreasing. On the one hand, as the American Nursing Association noted last year, "aging and an increase in chronic illness will increase the demand for nurses—particularly those with baccalaureate or master's degrees—in hospitals and nursing homes." American Nursing Association, *1999 House of Delegates Summary of Proceedings—Examining the Nursing Workforce*, *at* http://www.nursingworld.org/about/summary/sum99/workforc.htm (last visited Dec. 6, 2000). Furthermore, "[r]apid changes in technology and advances in patient care will increase the demand for nurses over the long term. While technological advances in patient care may reduce the incidence of some diseases, these reductions in morbidity could be offset by increases in the longevity of individuals with chronic illnesses." *Id.*

Despite the increasing demand for nurses, Peter Buerhaus, Director of the Harvard Nursing Research Institute, has predicted that the United States will experience:

> a significant shortage of registered nurses . . . beginning around 2007. Buerhaus foresees a rising demand for registered nurses based on such factors as an aging population, increased longevity of the chronically ill, technological advances, the increased prevalence of antibiotic-resistant infections, cost-cutting pressures of managed care, the shift from high-cost acute care facilities

> to lower cost ambulatory and community-based settings, and increased attention to quality improvement.

Id.[9] Some observers are even less optimistic, and have declared that the nursing shortage crisis is already here:

> Johns Hopkins Hospital . . . can't attract enough nurses to fully staff its operations even though it pays the top salaries in the market and has dramatically increased its use of more-expensive temporary staffing services, says Karen Haller, the hospital's vice president of nursing and patient-care services. . . .
>
> In Southern California, where the nursing shortage is one of the most acute in the country, the few unit closures to date may be just a hint of what is to come. . . .
>
> Hospital managers say they have the greatest difficulty in filling nursing positions in key specialty areas, such as critical-care units, operating rooms and emergency rooms.
>
> . . . . The situation is delivering another financial wallop to an industry already absorbing the shocks of Medicare spending controls, managed-care pressures and failed business strategies. And experts say the situation may not improve even if the economy slows down and employment levels decrease.[10]

---

[9] Similarly, the American Hospital Association predicts that, while the supply of RNs currently meets the demand for their services, demand is predicted to outpace supply somewhere between the years 2005 and 2010. *See* American Hospital Association, Trends Affecting Hospitals and Health Systems 54 (2000).

[10] Mary Chris Jaklevic and Ed Lovern, *A Nursing Code Blue: Few Easy Solutions Seen for a National RN Shortage That's Different from Prior Undersupplies*, Modern Healthcare, December 11, 2000, *available at* http://www.modernhealthcare.com/currentissue/topten.php3?refid=6320&db=mh99up&published=200121 (last visited Dec. 16, 2000).

As one commentator sums up the situation, "the United States today is facing shortages of key health personnel, particularly registered nurses . . . ."[11] For this reason, health care employers are increasingly forced to call on nurses to delegate nursing tasks to others—and to supervise others in the execution of those nursing functions.[12]

The incredible economic strain under which many health care providers currently operate is also forcing an increased reliance on nurse supervisors. Increasing operating expenses and frozen or decreasing reimbursements from private health plans and Medicare and Medicaid have subjected American health care providers to the economic equivalent of a one-two knockout punch.[13] Health care costs in the United States are expected to rise from around 10 percent of the gross domestic product in 1990 to approximately 16.6 percent in the year 2007. Rodger Doyle, *Health Care Costs*, Scientific American, April 1999 at 36. The rate of increase of health care costs is more than double the rate of inflation in the United States.[14]

---

[11] J. Duncan Moore Jr., *Survey: Nation Facing Shortage of Key Health Personnel Rather Than Predicted Surplus*, HealthLeaders.com, *at* http://www.healthleaders.com/index.cfm?section+9&screen=news&news_id=9922 (last visited Dec. 13, 2000).

[12] *See, e.g.*, G. Roger King, *Where Have All the Supervisors Gone?—The Board's Misdiagnosis of Health Care & Retirement Corp.*, 13 Lab. Law. 343, 357 (1997) (citing *Manor West, Inc. v. NLRB*, 60 F.3d 1195 (6th Cir. 1995)) (further citations omitted).

[13] *See generally*, Bruce Siegel, *Public Hospitals—A Prescription for Survival*, The Commonwealth Fund, October 1996, *at* http://www.cmwt.org/programs/minority/ siegel.asp#abstract (last visited Dec. 19, 2000).

[14] *See Health Care Costs Threaten Middle Class*, *at* http://www.americashealth.org/middle.html (last visited Dec. 17, 2000).

Despite these increases in cost, Congress has been reluctant to adjust reimbursements under Medicare and Medicaid, and even has taken action to cut reimbursements in some health care areas.[15] For example, "[t]he Balanced Budget Act [of 1997] cut a total of $14.3 billion from Medicare's home care budget . . . . In addition, the act instituted a new prospective payment system for nursing homes."[16] Many private health care plans have also refused to increase their reimbursements for increasingly expensive treatments, and some have taken steps to lower their reimbursement rates.[17] As with the reductions in Medicare / Medicaid reimbursements, this trend has subjected hospitals to heretofore unseen economic pressures. Indeed, some hospitals have been forced to cancel their contracts with private insurance providers due to insufficient reimbursement rates. *See, e.g.*, Steve Strunsky, *For Hospital and H.M.O., a Parting of the Ways*, N.Y. Times, Jan. 2, 2000, at 14NJ p. 6 (noting that inadequate reimbursement system caused hospital to cancel its contract with Blue Cross and Blue Shield).

---

[15] *See* Robert Kuttner, *The American Health Care System—Wall Street and Health Care*, The New England Journal of Medicine, February 25, 1999 at 664, *available at* http://www.nejm.org/content/1999/0340/0008/0664.asp (last visited Dec. 18, 2000).

[16] *Id.*; *see* 42 U.S.C.A. § 1395u (Balanced Budget Act of 1997); *Greater Dallas Home Care Alliance v. United States*, 10 F. Supp.2d 638, 641 (N.D. Tex. 1998) (holding that Balanced Budget Act's interim payment system was constitutional); *Vermont Assembly of Home Health Agencies v. Shalala*, 18 F. Supp. 2d 355, 371-72 (D. Vt. 1998) (holding that Congress' 1997 budget cuts to home healthcare were constitutional); *see also* Jeanne Schulte Scott, *BBA Bad News Gets Worse, Thanks to Flawed Calculations; Effects of the Balanced Budget Act of 1997 - An Error of 76 Percent in Favor of Medicare*, in Healthcare Financial Management, Sept. 1, 1999, at 24 (arguing that the Balanced Budget Act of 1997 is having a negative impact on the home health industry).

[17] *See* Kuttner, *supra*, note 15, at 664.

Because of these dual financial pressures, health care providers are finding themselves operating in crisis mode. Many large medical systems have reported losing millions of dollars per year, in large part due to reductions in reimbursements.[18] Not surprisingly, an alarming number of large hospital organizations have filed for bankruptcy.[19]

> The nation's second-largest nursing home operator filed for Chapter 11 bankruptcy protection [in January of this year], blaming its misfortune on federal cuts in Medicare reimbursement.
>
> Atlanta-based Mariner Post-Acute Network, which runs more than 400 nursing homes nationwide, said the 1997 Balanced Budget Act had cut its Medicare reimbursement by $115 per nursing home resident.
>
> "The crisis in long-term care continues to grow as dramatic Medicare cuts, explosive litigation costs and staffing shortages threaten the viability of long-term care providers," Mariner chairman Francis Cash said in a statement.

Another Nursing Home Chain Files for Bankruptcy Protection, Fox Market Wire Jan. 18, 2000, *at* http://www.foxmarketwire.com/wires/0118/f_ap_0118_2.sml (last visited Dec. 18, 2000). In addition, a significant number of acute-care hospitals have closed their doors due to the crisis in reimbursement. *See, e.g.*, Gary Shepard, *Number of Hospitals Falls To Record Lows*, LocalBusiness.Com, November 9, 2000, *at* http://www.localbusiness.com/Story/0,118,DDT_501167,00.html (last visited Dec. 18, 2000) (noting that "the

---

[18] *See, e.g.*, John Easton, *Teaching Hospitals Feel the Side Effects of Budget Cure*, Univ. of Chicago Magazine, June 1999, *available at* http://www.uchicago.edu/alumni.mag/index.html.

[19] *See* Kuttner, *supra* note 15, at 664.

number of community-based acute-care (non-specialty) hospitals in the United States has dropped below 5,000 . . . for the first time in 25 years" due to sharp revenue losses).

Needless to say, these economic realities force health care providers to make difficult choices. Layoffs are becoming more commonplace as health care institutions experience significant revenue shortfalls.[20] For example, last year Stanford Health Care laid off a number of employees "as a result of an unanticipated $10.7 million budget shortfall."[21] The hospital "attributed the shortfall to decreasing governmental funding of uninsured patients as well as low rates paid by HMOs."[22] Similarly, the University of Pennsylvania Health Care System last year laid off 1,100 employees, accounting for nine percent of the System's total personnel.[23] William N. Kelley, MD, CEO of the Penn Health System, and Dean of the University of Pennsylvania School of Medicine, commented, "This is a very sad day for all of us at the University of Pennsylvania Health System . . . . The combination of government cutbacks; denied, delayed or reduced payments from insurers; and increased amounts of uncompensated care is crippling hospitals and health systems nationwide."[24]

---

[20] *See, e.g.*, Jennifer Stewart, *USHC Workers Brace for Layoffs*, The Stanford Daily, (March 10, 1999, *available at* http://daily.stanford.org/Daily98-99/3-10-1999/news/NEWushc10.html (last visited Dec. 18, 2000).

[21] *Id.*

[22] *Id.*

[23] *See* Press Release, *Penn Health Statement*, May 25, 1999, *available at* http://www.upenn.edu/almanac/between/PHEALTH-layoffs.html (last visited Dec. 18, 2000).

[24] *Id.*

To make matters worse, health care institutions are experiencing increased turmoil in their workforces. There is a severe shortage of qualified staff personnel, making the jobs of hospital employees more difficult.[25] Strikes are becoming more and more commonplace. *See, e.g.*, David Kelly, *Health Care Workers Strike at 18 Hospitals, Demand Increases in Pay Labor*, L.A. Times, December 15, 2000 at B2 (reporting that "[t]housands of health care employees who say they are so overworked that patient care suffers walked off the job at 18 hospitals across the state Thursday to press demands for higher pay and increased staffing."). For example, this year 1,200 nurses employed by the Washington Hospital Center in Washington, D.C., staged a strike that lasted more than seven weeks. *See* Avram Goldstein, *Proposal Could End Walkout by D.C. Nurses*, Washington Post, November 7, 2000, at B1.

Perhaps the most serious repercussion of the current economic turmoil facing health care providers is the potential impact on the quality of patient care. As one commentator noted, cutbacks in reimbursement for services "might seriously compromise quality of care." Robert H. Binstock, *Symposium, Public Policies on Aging in the Twenty-First Century*, 9 Stan. L. & Pol'y Rev. 311, 318 (1998). In short, "the pace and nature of' the changes currently experienced in the health care industry "— along with heightened fears of layoffs and staff restructuring—have prompted concerns among RNs that patient care has suffered or will suffer and that the demands placed on nursing staff have led to higher incidences of work-related injuries and stress." Office of News and Public Information, *Hospitals and Nursing Homes Need Changes in*

---

[25] *See, e.g.*, Jeff Myers, *Staff Shortage Makes Hard Job More Difficult, Nurses Say*, Press Republican Online, Oct. 29, 2000, *at* http://www.pressrepublican.com/Archive/2000/10_2000/102920002.htm (last visited Dec. 18, 2000).

Mix of Nursing Personnel, at http://www.nationalacademies.org/onpi/pr/jan96/nurse.html (last visited Dec. 12, 2000).

In light of the changes the health care industry has undergone, there is no question but that, in order to deliver high-quality care more efficiently, registered nurses are being granted more and more supervisory powers by their employers. For example, one private California health system, in an effort to economize, recently granted Advanced Practice Registered Nurses ("APRNs") a broad range of duties traditionally reserved to doctors.[26] As a committee of the Institute of Medicine, charged by Congress with investigating the state of nursing in the United States, concluded:

> [i]ncreased pressure to deliver cost-efficient care to patients with more serious and often multiple conditions has forced hospitals to redesign delivery of care and reassess the roles of all nursing personnel. RNs have moved from direct patient care to coordinating and supervising patient care in hospitals . . . . In some institutions, nurse assistants are assuming greater responsibility for direct patient care under RN direction. . . .
>
> Registered nurses with advanced training and skills will [increasingly] be called on to fill roles that require professional judgment, supervision, and direction of the work of others. . . .[27]

---

[26] National Health Care Cost & Quality Assoc., *California Long Term Acute Care Hospital System Jettisons in-House Physician Coverage in Favor of Nurse Practitioner Program*, The NHCQA Bulletin, May 5, 2000, *available at* http://www.nhcqa.org/bul2,4.html (last visited Dec. 18, 2000).

[27] Office of News and Public Information, *Hospitals and Nursing Homes Need Changes in Mix of Nursing Personnel*, Jan. 8, 1996, *at* http://www.nationalacademies.org/ onpi/pr/jan96/nurse.html (last visited

According to the Committee Chairperson, "'As hospitals reorganize their staffing mix, continuing education in hospitals and schools should focus more on providing better management tools to nurses, including delegation and supervisory skills. . . .'"[28]

Therefore, given the sea change experienced by the health care industry, health care providers seeking to stay afloat are increasingly turning to cost-efficient nurses to supervise and oversee the delivery of health care. Indeed, one commentator has noted that as nurses in today's health care industry are called upon to "supervise more and more unlicensed personnel" it is increasingly important to provide registered nurses with the "managerial education they need to fulfill their widening roles in the late 1990s and beyond." Kerry Smith, *Back to School: Kaiser Offers Nurses a Chance to Study for BSN and Stay in the Workplace*, Nurseweek, (July 20, 1998), *available at* http://www.nurseweek.com/features/98-7/school.html. The Board's attempt to classify registered nurses as non-supervisory personnel simply ignores the realities of the health care workplace.

C. ENSURING TO EMPLOYERS LOYALTY OF NURSE-SUPERVISORS IS CRUCIAL TO THE HEALTH OF THE HEALTH CARE INDUSTRY

The foregoing demonstrates that many nurses are increasingly called upon to act as supervisors. With good reason, it is the policy of Section 2(11) to permit employers to treat as supervisors those—including nurses—who so act. As this Court has recognized, Section 2(11) is a product of Congress' efforts to preserve an equilibrium of power in the workplace. *See, e.g., Florida Power & Light Co. v. Int'l Bhd.*

Dec. 12, 2000).

[28] *Id.*

of Elec. Workers, Local 641, 417 U.S. 790, 807 (1974); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1213, 1217 (7th Cir. 1996) ("The structure of [29 U.S.C.] § 152 ensures that employers may rely on supervisors to exercise their independent judgment without the threat of accountability to the employees whom they supervise.").

The legislative history of the Taft-Hartley Act, which added Section 2(11), clearly illustrates this point. Senator Taft, for instance, noted that "[I]t is impossible to manage a plant unless the foremen are wholly loyal to the management." 93 Cong. Rec. 3952 (daily ed. April 23, 1947). The Senate Committee on Labor and Public Welfare noted that "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No.80-105, at 3 (1947).

Although it was the Senate's definition of supervisor that was ultimately included in the Act, it is worth noting that similar statements regarding the importance of supervisor loyalty were made in the House of Representatives. For instance, the House Committee on Education and Labor noted that employers, "as well as workers, are entitled to loyal representatives in the plants, but when the foreman unionize . . . they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." H.R. Rep. No. 80-245, at 14 (1947). The House Committee concluded that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." *Id.* at 17 (emphasis in the original). Importantly, the House Committee specifically listed

[d]octors, *nurses*, [and] safety engineers . . . ." as examples of the types of positions that must remain fully faithful to the interests of the employer, and not the unions. *Id.* at 16 (emphasis added).

The foregoing, in no uncertain terms, reveals Congress' intent that management be assured the complete loyalty of its "front line" supervisory staff. Congress' concerns regarding divided loyalties apply with even more force in the context of the health care profession. As this Court noted in *HCR*:

> [W]e do not share the Board's confidence that there is no danger of divided loyalty here. Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives the nursing home owners the ability to insist on the undivided loyalty of its nurses. . . .

HCR, 511 U.S. at 580-81.

Indeed, as Congress envisioned, nurses with divided loyalties will be less effective monitors of unionized caregivers under their supervision. The resulting decrease in oversight and discipline of health care workers endangers not only the safety and welfare of the workers themselves, but undoubtedly will endanger the health and safety of the patients under their care.[29]

---

[29] Furthermore, when the quality of care suffers, so suffers the health care provider. Health care providers are increasingly subject to medical malpractice suits, and any factor which inhibits providers' ability to control the quality of patient care will only increase their malpractice risk. *See* Paul L. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends Upon the Health of Hospital Peer Review*, 51 U. Pitt L. Rev. 1025, 1027 (1990) (citations omitted); *see also, e.g.*, *Gahm v. Thomas Jefferson Univ. Hosp.*, No. Civ. A- 94-2050, 2000 WL 233247 at *1 (E.D. Pa. Feb. 29, 2000) (noting that hospitals owe patients a "'nondelegable duty'" to provide quality care) (quoting *Thompson v. Nason Hosp.*, 527 Pa. 330, 339; 591 A.2d 703, 707 (1991)).

II. THE BOARD'S DETERMINATION THAT NURSE SUPERVISORY ACTS BASED UPON JUDGMENTS INFORMED BY PROFESSIONAL KNOWLEDGE, SKILL, OR EXPERIENCE DO NOT MEET THE "INDEPENDENT JUDGMENT" REQUIREMENT OF SECTION 2(11) OF THE NLRA IS IN ERROR.

A. THE TEXT OF SECTION 2(11) DOES NOT SUPPORT THE BOARD'S CONCLUSION.

There is no support in the Act's language for the Board's position that a nurse's supervisory directions to other employees do not meet "independent judgment" requirement of Section 2(11) where such directions, although free of employer constraints, are informed, in whole or in part, by a nurse's own professional or technical skill, knowledge, and experience.[30] As an initial matter, under any commonly

---

[30] The Board has presented this case as revolving around the question of whether a nurse's exercise of professional or technical judgment in directing employees "in accordance with employer-specified standards" constitutes the exercise of independent judgment. Brief for the National Labor Relations Board, at (I). SHRM and ASHHRA do not take issue with the proposition that an employer may, in certain instances, so hamstring the exercise of a would-be supervisor's judgment so as to prevent the exercise of "independent" judgment. SHRM and ASHHRA submit that the facts of this case do not demonstrate any "employer-specified standards" that so constrained the exercise of supervisory judgment. In any event, an examination of the numerous Board cases that deny nurses Section 2(11) supervisory status reveals that the Board applies its "professional and technical judgment" approach in cases in which employer constraint of the purported supervisor's judgment is not even arguably an issue. *See, e.g., Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996) ("Section 2(11) supervisory authority does not include the authority of another employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position. . . ."); *see also Loyalhanna Health Care Assocs.*, 332 NLRB No. 86, 2000 WL 1670884, at *3 (Oct. 30, 2000); *Elmhurst Extended Care Facilities,*

accepted definition of the term, "independent" means simply not subject to control by others. *See, e.g.*, Webster's New International Dictionary of the English Language, Vol. II, 1262 (2nd ed. 1939) (defining independent as "[n]ot subject to control by others; not subordinate; self-governing; sovereign; free"). This common-sense understanding of the term is bolstered by Section 2(11)'s contrast of exercises of authority involving "independent judgment" and those that merely are "clerical" or "routine"—i.e., those that simply involve the rote implementation of the decisions of others. Thus, under the Act's plain language, judgment unfettered by an employer's or other external constraints, even if informed by the training, experience, and skill that a nurse has worked years to acquire, is independent judgment. *See Beverly Enters., Va., Inc. v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1999) ("[C]ertain types of decisional authority, regardless of the manager's professional knowledge, make one a supervisor under the NLRA.").[31] Indeed, the reason individuals in many instances, and in many industries, are placed in supervisory or management positions is because of factors such as experience, background, training and education. There is no statutory support (or public policy

---

329 NLRB No. 55, 1999 WL 801516, at *5 n.9 (Sept. 30, 1999); *Vencor Hosp.-Los Angeles*, 328 NLRB No. 167, 1999 WL 606678, at *5 (Aug. 5, 1999).

[31] This Court, in *HCR*, 511 U.S. at 579, stated in dicta that it was "no doubt true" that the phrase "independent judgment" is "ambiguous" and that the Board needed "ample room to apply [the term] to different categories of employees." *Amici* respectfully disagree with this Court's assessment of the phrase "independent judgment" as ambiguous. In any event, *Amici* submit that the "ample room" described in *HCR* does not provide the authority for "distorting the statutory language in the manner proposed by the Board." *Id.* at 581; *see also Providence Hosp.*, 320 N.L.R.B. at 726 (in which the Board acknowledged that *HCR* held that Section 2(11) must drive Board policy, not the other way around"). Further, as noted *supra*, the Board's "discretion" to date in this area is also extremely poor public policy.

support) for the proposition that health care employers should not have the same rights to select a nurse supervisory workforce.

B. THE BOARD'S INTERPRETATION OF INDEPENDENT JUDGMENT RENDERS OTHER PORTIONS OF SECTION 2(11) MEANINGLESS

The context of the phrase "independent judgment" in Section 2(11) further reinforces the conclusion that the Board's interpretation of the phrase cannot stand. Particularly in the health care field, the Board's false dichotomy between independent judgment and judgment informed by professional skill, experience, or training would effectively render meaningless two of Section 2(11)'s enumerated functions: "assign" and "responsibly to direct."[32] *Cf. HCR*, 511 U.S. at 578-79 (noting that the Board's pre-*HCR* test for supervisory status in nurse-supervisor cases read the responsible direction portion of Section 2(11) out of the statute). As this Court acknowledged in *HCR*, the business of health care employers is the welfare of patients. 511 U.S. at 580.[33] It naturally follows that the assignments and directions from a health care employer to the employees "in the trenches"—i.e. those who actually perform health care services for patients—will be

---

[32] *Cf. Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) ("Because reasoned decisionmaking demands it, and because the systematic consequences of any other approach are unacceptable, the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle . . . ."); *Mid-America Care Found. v. NLRB*, 148 F.3d 638, 642 (6th Cir. 1998) (same).

[33] *Cf.* American Health Care Association, Facts & Trends: The Nursing Facility Source Book viii (1999) ("Meeting and improving the quality of life for nursing facility residents through improved service is the top priority for administrators and direct care staff in this decade and will continue to be paramount in the 21st century").

grounded in judgments related to patient care. These judgments, in turn, will be made by persons who possess superior skill, training, and experience regarding patient care. *See, e.g., Schmurmacher Nursing Home v. NLRB*, 214 F.3d 260, 269 (2nd Cir., 2000) ("Managerial power and expertise are often joined together for reasons too obvious to require further explanation, and any effort to treat them as mutually exclusive cannot be squared with the statute."); *NLRB v. Attleboro Assocs., Inc.*, 176 F.3d 154, 167 (3rd Cir. 1999) (noting that "decisions to assign workers are inseverable from independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well-being") (internal quotations and citations omitted). Thus, if judgments based upon superior skill, training, and experience in matters of patient care are not "independent judgments," most—if not all—of the assignments and directions by nurses in the health care field would not be Section 2(11) supervisory decisions.[34]

---

[34] Contrary to its contentions, the Board's position that nurses, as a general rule, do not exercise independent judgment in the execution of Section 2(11) functions—including the assignment and direction functions—is a recent phenomenon. Indeed, as the Board itself has admitted, prior to the 1974 Health Care amendments to the Act, "[c]harge nurses were found supervisory" where the facts demonstrated that "they utilized their professional judgment in assigning and directing other employees." *Beverly Enters.—Ohio*, 313 N.L.R.B. 491, 509 n.12 (1993) (citing *Avon Convalescent Ctr.*, 200 N.L.R.B. 702,705 (1972) and *Rockville Nursing Ctr.*, 193 NLRB 959, 962 (1971)). Following the Health Care amendments, the Board reversed itself on the issue, but it did so by adopting the "interest of the employer" test that this Court rejected in *HCR*. *See id.* at 492-93. This test, of course, did not focus on Section 2(11)'s independent judgment prong. *See id.* 493 ("*If* the individual independently exercises supervisory authority, the Board must *then* determine if that authority is exercised 'in the interest of the employer.'") (emphasis added); *id.* at 509 n.12 (reversing *Avon* and *Rockville* as inconsistent with the interests of the employer test). Thus, it was only after *HCR* that the Board adopted its current position vis a vis Section 2(11) in nurse-supervisor cases. *See generally Beverly Enters., Va.*, 165 F.3d at 295-96 (describing—and criticizing—the evolution of Board decisionmaking on the question of supervisory status in the nursing field).

The Board's effective truncation of Section 2(11) poses grave consequences for employers. As an initial matter, perhaps not surprisingly, the "assign" and "responsibly direct" functions are those most usually at issue in nurse supervisor cases. *See* Wilma B. Leibman & Peter J. Hurtgen, *The Clinton Board(s)—A Partial Look From Within*, 16 Lab. Law. 43, 48 (2000) ("While health care employers make a variety of supervisory arguments, the question usually boils down to whether the charge nurses have the statutory authority to 'assign' or 'responsibly direct' other employees.").[35] Thus, the Board's approach to Section 2(11) effectively ensures that virtually no nurse will be deemed to be a "supervisor" under the Act. Furthermore, for many hours of the day in many long-term care facilities and in many discrete areas or departments of acute-care hospitals, nurses are the highest ranking employees on duty—and thus the only representative of an employer "in charge." *See Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 341 (4th Cir. 1999); *Grancare, Inc. v. NLRB*, 137 F.3d 372, 376 (6th Cir. 1998). Therefore, if the Board's purported distinction between judgments based upon "independent judgments" and judgments based upon a nurse's skill, experience, and training is allowed to stand—and thus if the assignments and directions of nurses are not Section 2(11) supervisory activities—health care employers must simply accept the curious notion that their institutions operate for long

---

[35] *Cf. Attleboro*, 176 F.3d at 160 (noting the Board's "biased mishandling of cases involving supervisors") (internal quotations and citations omitted); *Spontenbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2nd Cir. 1997) (noting "the Board's manipulation of the definition of supervisor"); *Winnebago Television*, 75 F.3d at 1214 (same); *Schnuck Mkts., Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (same); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982) (same).

stretches without effective supervision, essentially on auto-pilot. This, of course, is contrary to the purposes of Section 2(11), *see, e.g., Florida Power & Light Co.*, 417 U.S. 790, 808 (1974) (noting that employers are entitled to loyal representatives in their facilities), and to common sense, *see, e.g., Glenmark Assocs.*, 147 F.3d at 341 ("We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments."); *Grancare*, 137 F.3d at 376 (noting that an interpretation of Section 2(11) that would mean that a nursing home had no on-site supervision almost half the time was not a reasonable conclusion for a well-run nursing home).[36]

C. THE BOARD'S INTERPRETATION OF INDEPENDENT JUDGMENT IS NOT NECESSARY TO RESOLVE "TENSION" BETWEEN SECTIONS 2(11) AND 2(12)

The Board argues that its current interpretation of the term "supervisor" is necessary to reconcile Congress' exclusion of supervisors in Section 2(11) and its inclusion of professionals in Section 2(12). *See* Brief of the National Labor Relations Board, at 32-35. This is not the case. As an initial matter, the purported tension between Section 2(11) and Section 2(12) should not be overstated. It is, of course, true

[36] *Cf. Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000) ("[T]he Board's ruling has the curious implication that a ship with more than 1000 people aboard it . . . has no supervisor on board *at any time*, making the situation, in the Board's view, a little like that of the *Patna* in Conrad's novel *Lord Jim* after the crew abandoned it.") (emphasis in the original); *Schnuck Markets*, 961 F.2d at 706 ("Nor is it a reasonable conclusion to suppose that Schnucks would operate one of its largest stores for eight hours every day with twelve to sixteen employees on staff without on-site supervision.").

that professional employees are covered by the Act and supervisors are not. It is also true that some of the language in Section 2(11) is roughly paralleled in Section 2(12). Section 2(11) defines a supervisor, in part, as one who uses independent judgment in the execution of one or more enumerated activities. Section 2(12) defines a professional employee, in part, as one who uses "discretion and judgment" in the exercise of his or her duties. As Member Cohen pointed out in his dissent in *Providence Hosp.*, however, the distinction between the two sections is "substantial and real." 320 N.L.R.B. 717, 737 (1996) (Cohen dissenting). A professional exercises discretion and judgment with respect to tasks that he or she performs. A supervisor, on the other hand, exercises independent judgment with respect to the tasks listed in Section 2(11) and vis-a-vis employees. *See, e.g., Attleboro Assocs.*, 176 F.3d at 168 ("There is an obvious distinction between exercising independent judgment or acquired skill in completing a task, on the one hand, and using independent judgment in performing one of the 12 section 2(11) tasks, on the other."). Thus, by way of example, the task of devising a treatment plan involves the use of professional judgment. The task of implementing that plan, however, may involve the exercise of supervisory responsibilities vis-a-vis employees who actually carry out the plan. In some instances the task of creating the plan and the task of implementing the plan may be lodged in the same person, but this will not always be the case. Thus, as the Second Circuit stated in *Schnurmacher Nursing Home*, 214 F.3d at 268:

> It may be the case that one who makes a judgment about the need for certain actions based on specialized knowledge and experience and exercises no further authority is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor.

In any event, to the extent that there is tension between Sections 2(11) and 2(12), this does not entitle the Board to "distort[] the statutory language" of Section 2(11) to resolve this tension. *HCR*, 511 U.S. at 581. This Court has made clear that "[t]he Act does not distinguish professional employees from other employees for the purposes of the definition of supervisor in § 2(11)." *Id.*; *see also Attelboro Assocs.*, 176 F.3d at 168 ("Consequently, it is impossible to comprehend how a nurse's status as a professional employee negates her status as a supervisor."). The Board may not avoid a straightforward and textually honest application of Section 2(11) in nurse-supervisor cases simply because it dislikes the results. *See Providence Hosp.*, 320 N.L.R.B. at 726 (acknowledging this Court's command that "Section 2(11) must drive Board policy, not the other way around").

D. THE LEGISLATIVE HISTORY OF SECTION 2(11) DOES NOT SUPPORT THE BOARD'S CONCLUSION

The legislative history of the Taft-Hartley Act also makes clear that an employee, who in the directions of others, uses judgment unfettered by the employer but informed by the employee's skill, knowledge and experience uses independent judgment for the purposes of Section 2(11). Following the adoption of Senate Report No. 105, Senator Flanders successfully proposed an amendment which added Section 2(11)'s "responsibly to direct" language. Senator Flanders' comments on the proposed language not only illustrate the reasons behind the amendment, they also illustrate proper interpretation of the phrase "independent judgment."

> Many of the activities described in paragraph (11) are transferred in the modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on

> other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some management methods the supervisor might be deprived of authority for most of the functions enumerated [in Section 2(11)] and *still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability*. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees. . . ." Their essential managerial duties are best defined by the words "direct responsibly," . . . .
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected.

93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders) (emphasis added).

Notwithstanding Senator Flanders' statement, the Board and *Amici* supporting the Board's position argue that nurses are the equivalent of "straw bosses" or "leadpersons." The Board and such *Amici* are vague as to the definitions of these terms, however, most likely because the applicable definitions belie any claim that nurses qualify as such. For example, the term "straw boss" is derived from the logging industry:

> In the early days of logging in mountainous country straw was spread upon slopes too steep for horses to hold back a sled load of logs. . . . After each passage, sometimes at a full gallop to keep the horses ahead of the load, the straw was naturally displaced so a man with a pitchfork was posted at each slope to keep the straw evenly distributed. Although teamsters were men of consequence in the lumber camps, the rule was that they were not to start down a slope until the far humbler functionary with a pitchfork, using his "independent judgment," passed word that the slope was prepared. . . . *Perhaps a modern counterpart would be an attendant at a company parking lot with the authority to direct higher-ups in the organization with respect to parking their cars.*

NLRB v. Swift & Co., 292 F.2d 561, 563 n.2 (1st Cir. 1961) (emphasis added). The Board cannot possibly argue that the majority of nurses in this country are merely "functionar[ies] with a pitchfork" providing limited direction to "higher-ups" in one basic task.[37]

---

[37] Similarly, a "leadperson" is a craftsperson or other low-level skilled employee "whose primary function is physical participation in the production or operating processes of [his or her] employer['s] plants and who *incidentally direct[s] the movements and operations of less skilled subordinate employees.*" *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791 (1956) (emphasis added). The instructions of leadpersons are "inherent in the craftsman-helper relationship." *Id.* The Board cannot argue that nurses' supervisory direction of those within their charge is merely an "incidental" portion of nurses' duties. Rather, supervision and direction of others is a primary responsibility for many of today's nurses. Furthermore, it is somewhat remarkable that the Board attempts to argue, on the one hand, that nurses are not Section 2(11) supervisors because they are Section 2(12) professionals (i.e. "persons of consequence" employed to exercise judgment) while arguing simultaneously that nurses are not Section 2(11) supervisors because they are lowly straw bosses or leadpersons.

Senator Flanders thus offered his amendment because, without it, Section 2(11)'s definition of supervisor "cover[ed] adequately everything except the basic act of supervising"—providing responsible direction to other employees, using "personal judgment based on personal experience, training, and ability." *Id.* Yet, judgments based on "personal experience, training, and ability" are the very judgments that the Board currently asserts are not "independent" judgments under the Act. The Board's position on this point is simply wrong.[38]

---

[38] Senator Flanders indicated the reasons that those who provide responsible direction based upon "personal experience, training, and ability" are rightly considered supervisors under Section 2(11).

> The reasons are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost control of his business. He cannot run it effectively. If he cannot run it effectively and efficiently, he cannot continue in business profitably. If he cannot operate profitably, he is a bad manager, not only from the stockholders' standpoint, but also from that of the working force as well. Only a profitable business can furnish sustained employment at good wages. At this point the interests of stockholders and employees are identical.

93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders). These words apply with even more force in a health care setting, where patient care is the employer's business. *See HCR*, 511 U.S. at 577-78 (finding no distinction acts taken in connection with patient care and acts taken in the interests of the employer). Where the Board impedes the employer's ability to properly run a health care institution, patient well-being—not simply the bottom line—is jeopardized.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

G. ROGER KING
Counsel of Record
JEFFREY D. WINCHESTER
E. MICHAEL ROSSMAN
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

Counsel for *Amici Curiae*

December 2000

No. 99-1815

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF RESPONDENT

THOMAS V. WALSH
Counsel of Record
THOMAS P. McDONOUGH
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
Attorneys for Amicus Curiae
American Health Care Association
One North Broadway
Suite 1502
White Plains, New York 10601
(914) 328-0404

164272

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Interest of *Amicus Curiae*	1
Summary of the Argument	2
Argument	4
The NLRB Could Not Find A Violation Of § 8(a)(5) Without Proving That KRCC's Nurses Are "Employees" Under The Act	4
A. The NLRA and the APA Require the Board to Prove Every Element of an Alleged Unfair Labor Practice.	5
B. Supervisory Status Is Not an Affirmative Defense in an Unfair Labor Practice Proceeding.	7
C. Supervisory Status Is not an "Exemption" from the Act, but a Protected Right of Employers.	11
1. The Sixth Circuit Harmonizes the Act's Protections of the Rights of both Employers and Employees.	11
2. The Board's Policy Bias Against Finding Supervisory Status Justifies the Sixth Circuit's Allocation of The Burden Of Persuasion.	17

Contents

	Page
D. NLRB Representation Procedures Are Inadequate to Establish a Factual Basis Sustaining a Finding of Violation.	19
Conclusion	24

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Beverly Enterprises, Virginia, Inc. v. NLRB, 165 F.3d 290 (4th Cir. 1999)	17
Boire v. Greyhound Corp., 376 U.S. 473 (1964) ..	21
Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1997)	18, 19
Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994)	6, 9, 10
District 2, Marine Eng'rs Beneficial Ass'n v. Amoco, 554 F.2d 774 (6th Cir. 1977)	16
Glenmark Associates, Inc. v. NLRB, 147 F.3d 333 (4th Cir. 1998)	17, 18
HeartShare Human Services of New York, 317 N.L.R.B. 611 (1995)	10
Newspaper Drivers & Handlers v. NLRB, 735 F.2d 969 (6th Cir. 1984)	16
NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Cir. 1987)	5, 15, 18
NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994)	1

Page

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 5, 6, 7, 8, 9, 10

Ohio Masonic Home, 295 N.L.R.B. 390 (1989) ... 20

Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2d Cir. 1997) 17

St. Mary's Home v. NLRB, 690 F.2d 1062 (4th Cir. 1982) 17

Steadman v. SEC, 450 U.S. 91 (1981) 6

Wright Line, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) 8, 9, 10

Statutes:

5 U.S.C. § 553 5

5 U.S.C. § 556(d) 3, 6, 7, 9, 10, 23

29 U.S.C. § 152(11) ..... *passim*

29 U.S.C. § 157 8

29 U.S.C. § 158(a)(3) 8, 10

29 U.S.C. § 158(a)(5) ..... *passim*

29 U.S.C. § 159(a) 3, 7, 20

29 U.S.C. § 160(c) 3, 5, 6, 7, 10, 20, 22

Page

Other Authorities:

John D. Feerick, Henry P. Baer, and Jonathan P. Arfa, *NLRB Representation Elections* (1989) ... 20, 21

H. Rep. No. 245, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 296 (Comm. Print 1974) .. 13

H Rep. No. 245, 80th Cong., 1st Sess. 8, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 299 (Comm. Print 1974) .. 14

H. Rep. No. 245, 80th Cong., 1st Sess. 13, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 304 (Comm. Print 1974) .. 13

H. Rep. No. 245, 80th Cong., 1st Sess. 14, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 305 (Comm. Print 1974) .. 13

H. Rep. No. 245, 80th Cong., 1st Sess. 15, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 306 (Comm. Print 1974) .. 14

Page

H. Rep. No. 245, 80th Cong., 1st Sess. 17, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 308 (Comm. Print 1974) .. 15, 16

H.R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946) 6

S. Rep. No. 105, 80th Cong., 1st Sess. 1, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 407 (Comm. Print 1974) .. 12

S. Rep. No. 105, 80th Cong., 1st Sess. 3, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 409 (Comm. Print 1974) .. 12, 13

S. Rep. No. 105, 80th Cong., 1st Sess. 4, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 410 (Comm. Print 1974) .. 13, 14

S. Rep. No. 105, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 411 (Comm. Print 1974) .. 14

Page

S. Rep. No. 105, 80th Cong., 1st Sess. 19, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 425 (Comm. Print 1974) .. 15

29 C.F.R. § 101.10(b) 6

29 C.F.R. § 101.20 20

BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the American Health Care Association ("AHCA") respectfully submits this brief *amicus curiae* supporting the brief of respondent Kentucky River Community Care, Inc. ("KRCC" or "the Employer").[1]

INTEREST OF *AMICUS CURIAE*

The AHCA is a federation of 48 state health organizations, together representing nearly 12,000 health care providers. AHCA members collectively care for more than one million elderly and disabled individuals. The AHCA represents and advocates for the nation's long-term care community and for individuals who require long-term care services because of social needs, disability, trauma, or illness.

In this case, the Court again addresses the failure of the National Labor Relations Board ("NLRB" or "the Board") to correctly apply the statutory standard of supervisory status set forth in Section 2(11) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 152(11), in the health care industry, despite this Court's holding in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). In the case at bar, the Board's finding that charge nurses are not supervisors is the predicate for its holding that KRCC violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by refusing to bargain with the

---

1. Pursuant to Rule 37.6, the AHCA states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the AHCA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

Kentucky State District Council of Carpenters (the "Union"). The Court will also determine whether the Board impermissibly shifted the burden of proving supervisory status under Section 2(11) to KRCC. These questions are of great importance to the members of the AHCA, who rely on their nurses to supervise the quality and consistency of the care provided to patients and residents. The AHCA expects the parties will fully brief issues surrounding the application of Section 2(11); this Brief will focus on the burden of proof issue. The AHCA posits, *inter alia*, that in enacting Section 2(11) Congress expressly protected the right of the employer to rely upon the loyalty of its supervisors. The AHCA supports the analysis of the Sixth Circuit, which recognizes and protects that right.

SUMMARY OF THE ARGUMENT

The NLRB found that KRCC violated Section 8(a)(5) of the Act by refusing to collectively bargain with the Union concerning a Board-certified bargaining unit comprised of the Employer's nurses. A statutory element of a Section 8(a)(5) violation is that the bargaining unit at issue be an *appropriate* unit under the Act. A unit of supervisors is *not* an appropriate unit, and an employer's refusal to bargain in such a unit is *not* a violation of Section 8(a)(5). KRCC contended its nurses are supervisors within the meaning of the Act; the Board found they are not supervisors.

The determination that KRCC's nurses are not supervisors was made by the Board through an NLRB representation case. Although representation cases are deemed "non-adversarial" by the Board, NLRB procedure placed the burden of proof regarding supervisory status upon KRCC. NLRB representation case determinations are not

subject to judicial review; thus, KRCC sought review by refusing to bargain with the Union, and subsequently litigating the Section 8(a)(5) charge which followed.

In the unfair labor practice proceeding, no hearing before an administrative law judge was held. The record of the representation proceeding on the question of supervisory status was conclusive on the issue of the appropriateness of the bargaining unit. Thus, although the Board had never borne any burden of proving the elements of a Section 8(a)(5) violation, the Employer was found guilty of violating federal law.

On review, the Sixth Circuit held, *inter alia*, that the NLRB should have had the burden of proof that KRCC's nurses were not supervisors, and thus the certified bargaining unit was appropriate.

The Sixth Circuit's requirement is well-grounded in applicable law and the decisions of this Court. Sections 8(a)(5) and 9(a) of the Act establish that a respondent acts unlawfully *only* if it refuses to bargain concerning an *appropriate* unit. This Court has long recognized that Section 10(c) of the NLRA assigns the burden of proof to the Board to prove all the elements of an unfair labor practice. This is consistent with the demands of Section 7(c) of the Administrative Procedure Act ("APA"), which places the burden of persuasion upon the Board as the proponent of a finding that the Employer violated the Act.

The Circuit Court's judgment also reflects a sound understanding of congressional intent and of NLRB procedure. The contentions of the Board and the Union that employers bear the burden to prove the status of supervisors

as an "affirmative defense" to a charge, or as a statutory "exemption," disregard the explicit policies and protections afforded employers by the Taft-Hartley Act of 1947. While the Act protects employee rights, Congress expressly *intended* that the Board *also* recognize and protect the Employer's right to the undivided loyalty of its supervisors. The Circuit Court correctly harmonizes that protection of supervisory rights with the requirement that the Board prove all elements of a violation, to conclude that it is the Board which must show the employee status of KRCC's nurses.

Moreover, implicit in the Sixth Circuit's rationale is recognition of the inadequacy of Board representation procedure as a substitute for the agency carrying the burden of proof in an unfair labor practice trial. The absence of vehicles for resolving credibility conflicts, the remoteness of the finder of fact from the hearing, and the Board's oft-cited policy bias against the supervisory status of nurses create due process concerns which would undermine any findings of violation of the law.

ARGUMENT

THE NLRB COULD NOT FIND A VIOLATION OF § 8(a)(5) WITHOUT PROVING THAT KRCC'S NURSES ARE "EMPLOYEES" UNDER THE ACT

The Board seeks enforcement of its order directing KRCC to bargain with the Union. The Board found KRCC violated Section 8(a)(5) of the Act by refusing to bargain with the Union. KRCC denies any violation because the bargaining unit is comprised of supervisory employees. The U.S. Court of Appeals for the Sixth Circuit correctly denied enforcement because the NLRB failed to prove the nurses at

issue were "employees," not "supervisors," within the meaning of the Act. The NLRB asks this Court to reverse the Sixth Circuit decision, including its holding that the Board bears the burden of proof on all elements of the alleged unfair labor practice, including the nurses' status as non-supervisors. Because the Circuit Court's holding is supported by statute, case law, and sound administrative and procedural policy, this Court should uphold the decision of the Sixth Circuit.

Simply put, the Sixth Circuit has long held that "[t]he Board always has the burden of coming forward with evidence showing that the employees are not supervisors in bargaining unit determinations." *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987). In so holding, the Sixth Circuit alone has considered — and harmonized — the intentions of Congress as expressed in the Wagner Act of 1935 and the Taft-Hartley Act of 1947 along with the demands of the Administrative Procedure Act, 5 U.S.C. § 553.

A. The NLRA and the APA Require the Board to Prove Every Element of an Alleged Unfair Labor Practice.

It is axiomatic that the agency prosecuting a party bears the burden of proving each element of the alleged offense. This Court has held "that throughout the proceedings, the [NLRB] General Counsel carries the burden of proving the elements of an unfair labor practice." *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983); *see also*, 29 U.S.C. § 160(c). Section 10(c) of the NLRA, 29 U.S.C. § 160(c), provides that the Board's findings must be by "the preponderance of the testimony." This Court has interpreted Section 10(c) and Board regulations as assigning

the burden of persuasion on the Board to establish violations of the NLRA. *Transportation Management*, 462 U.S. at 401, *citing* 29 U.S.C. § 160(c) and 29 C.F.R. § 101.10(b).

Section 7(c) of the Administrative Procedure Act provides that the "proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record . . . and supported by the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 95 (1981).

In *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) ("*Greenwich Collieries*"), this Court reviewed the legislative history of the APA:

> Every proponent of an order has the burden of coming forward with sufficient evidence therefore; any fact shown by credible evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence. . . .

Id. at 279, *citing* H.R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946). This Court has applied the APA and Section 7(c) in its review of orders issued by the National Labor Relations Board. *See, e.g., N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In the case at bar, the culpability of the employer was dependent entirely on its nurses not being deemed "supervisors." The NLRB found that KRCC unlawfully

refused to bargain with the Union in violation of Section 8(a)(5) of the Act, which provides that it is a unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of Section [9 (a)]* of this title." 29 U.S.C. § 158(a)(5) (emphasis added). Section 9(a) provides that such representatives may only be designated "in a unit appropriate for such purposes." 29 U.S.C. § 159(a). Congress thus included the appropriateness of the bargaining unit as an essential element of any Section 8(a)(5) violation. However, in this case, the Board bore no burden of proof as to the non-supervisory status of the nurses, and none on the propriety of the unit. Because the Board has not proven this essential element of the unfair labor practice, the Circuit Court correctly refused to enforce the Board's order.

B. Supervisory Status Is Not an Affirmative Defense in an Unfair Labor Practice Proceeding.

Despite this statutory language and the directives of Section 10(c) of the NLRA and Section 7(c) of the APA, the Union argues that the question of whether putative supervisors should be excluded from a bargaining unit is an "affirmative defense" to be borne by employer-respondents. Union Brief, p. 38-39. Petitioner also invokes *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in which this Court upheld the Board's creation of an affirmative defense under plainly different circumstances. Petitioner Brief, p. 37.

The Board has traditionally shifted in the burden of proof to respondents in unfair labor practice cases alleging discriminatory action, where the respondent offers the affirmative defense that it would have engaged in the same

conduct regardless of union animus, for legitimate and lawful reasons. *See Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Section 8(a)(3) of the Act proscribes an employer from discriminating against employees based on their union activities or sympathies. 29 U.S.C. § 158(a)(3). The affirmative defense burden shift, which was upheld by this Court in *Transportation Management*, 462 U.S. at 401 is often referred to as a *Wright Line* defense. As this Court described it,

> [T]he unfair labor practice consists of a discharge or other adverse action . . . [where] the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under Section 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under Section 10(c).

Transportation Management, 462 U.S. at 401. Still, "the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge." 462 U.S. at 400, *citing* 29 U.S.C. § 157. The gravamen of this case suggested that the Board need only *produce* evidence to trigger a shift to the respondent to prove its affirmative defense.

However, this Court clarified the proper use of a *Wright Line* affirmative defense in *Greenwich Collieries*, 512 U.S. 267 (1994). The Court stated that, as an initial matter, the drafters of the APA used the term "burden of proof" to mean burden of persuasion:

> The burden of proof is the obligation on one of the parties to persuade the trier of facts of the truth of a proposition affirmatively asserted by the pleadings. . . . The proper meaning of the burden of proof is the duty of the party alleging the case to prove it, rather than the duty of a party to introduce evidence.

Id. at 276. Although the proponent of the order always retains the ultimate burden of persuasion, a party has the burden of persuasion regarding any affirmative defense asserted. The Court overruled any element of *Transportation Management* which limited an agency's burden under Section 7(c) to merely a burden of production. *See* 462 U.S. at 403 n.7. However, this Court found the *Wright Line* shift of burdens still appropriate under closely defined circumstances:

> The NLRB's approach in *Transportation Management* is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.

Id. at 278.

Thus, the rule of *Transportation Management*, as redefined in *Greenwich Collieries*, is that the Board is permitted under Section 10(c) of the NLRA and Section 7(c) of the APA to shift the burden of proof, as an affirmative defense, in cases of alleged violations of § 8(a)(3) of the Act in which it is alleged the respondent took discriminatory action against employees based on their protected activities. This classic "*Wright Line*" analysis starkly contrasts with the instant matter, an alleged § 8(a)(5) violation, based on the putative status of the nurses as supervisors. The case at bar is *not* consistent with the limitations of the allowable shifting of burdens as defined by this Court. Moreover, the Court permitted affirmative defense burden shifting in those cases *only* because the Board was still actually required to *prove* all the elements of the unfair labor practice in question. In the case at bar, the Board stands this requirement on its head: it has imposed on the respondent the burden to *dis*prove an essential element of the unfair labor practice.[2]

---

2. The Union cites *HeartShare Human Services of New York*, 317 N.L.R.B. 611 (1995), to support its position that supervisory status is an affirmative defense. In that case, the Board declined to address the employer's contention that employees included within the bargaining unit were supervisors because it did not raise that issue during representation proceedings. *Id.* at 611 n.1. In other words, even where no record at all is developed regarding supervisory status or unit appropriateness, the Board finds that its General Counsel has no obligation to establish the certified unit is proper.

C. Supervisory Status Is not an "Exemption" from the Act, but a Protected Right of Employers.

Petitioner also contends that supervisory status is an exemption from the Act which must be proven by the party asserting it. Petitioner Brief, p. 38. The Sixth Circuit rejects that myopic view of the Act, finding that the Board has routinely ignored the express provisions of the Taft-Hartley amendments of 1947 which mandate protection of employers' supervisory rights. The Board's disregard for these provisions is not new; numerous courts and commentators have ascertained an inherent policy bias in Board decisions finding nurses not to be supervisors under the Act.

1. The Sixth Circuit Harmonizes the Act's Protections of the Rights of both Employers and Employees.

Supervisors, as defined by Section 2(11) of the Act, 29 U.S.C. § 152(11), are excluded from coverage of the Act. The Board asserts that since the NLRA protects employee rights, identification of individuals as "supervisors" is an attempt to "exempt" them from the protections accorded employees under the Act. Petitioner Brief, p. 24-25. Thus, contends the Board, since KRCC seeks to exempt its nurses from coverage of the Act, principles of statutory construction require that KRCC *must* bear the burden of proof that the nurses meet the statutory definition. *Id.* Implicit in the Board's argument is the assumption that the rights of employees to engage in collective concerted activity is the *only* interest protected by the Act. However, the Board ignores the specific and express intentions of Congress articulated with passage of the Taft-Hartley amendments in 1947 — the amendments which brought the definition of

"supervisor" to the Act. The legislative history of the Taft-Hartley amendments shows that Congress viewed supervisors as far more than merely employees who are "exempt" from the Act.

To be sure, as originally drafted, the Act solely concerned employee rights. However, as experience under the Act matured, Congress recognized other competing interests needed to be protected. The Taft-Hartley amendments specifically sought to harmonize the benefits gained by employees under the Act with "carefully drawn legislation" to eliminate "specific types of injustice [and] clear inequities between employers and employees." S. Rep. No. 105, 80th Cong., 1st Sess. 1, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 407 (Comm. Print 1974).

One of the injustices the Taft-Hartley Act addressed was the fact that, under the Wagner Act, the Board was free to consider "supervisors" to be "employees" within the protection of the law:

SUPERVISORY PERSONNEL

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the [invocation of] the Wagner Act for covering supervisory personnel, traditionally regarded as part of management. . . .

S. Rep. No. 105, 80th Cong., 1st Sess. 3, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 409 (Comm.

Print 1974). Likewise, Representative Hartley's House report identified "the loyalty of supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board" as an evil sought to be corrected by the amendment. H. Rep. No. 245, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 296 (Comm. Print 1974). "The evidence before the committee showed this to be one of the most important and most critical problems." H. Rep. No. 245, 80th Cong., 1st Sess. 13, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 304 (Comm. Print 1974).

> . . . [U]nionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants . . .

H. Rep. No. 245, 80th Cong., 1st Sess. 14, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 305 (Comm. Print 1974).

The Senate Report considered the continuation of the Board's policy with respect to superiors to be "folly." S. Rep. No. 105, 80th Cong., 1st Sess. 4, reprinted in

Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 410 (Comm. Print 1974). The Senate Report included a recitation of the danger to industry if employers were bound to recognize and collectively bargain with units comprised of supervisors. Senator Taft's report concluded: "*It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen.*" S. Rep. No. 105, 80th Cong., 1st Sess. 5, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 411 (Comm. Print 1974) (emphasis added). Similarly the House report, in a section headed "RIGHTS OF EMPLOYERS," stated:

> The evidence further shows that management must have . . . agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers.

H. Rep. No. 245, 80th Cong., 1st Sess. 8, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 299 (Comm. Print 1974) (emphasis added). The House report concluded:

> If management is to be free to manage American industry as in the past and to produce the goods o which depends our strength in war and our standard of living always, the *Congress must exclude foremen from the operation of the Labor Act*. . . .

H. Rep. No. 245, 80th Cong., 1st Sess. 15, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 306 (Comm. Print 1974) (emphasis in original).

In language which presaged contemporary circuit court decisions, the House report found in 1947 that the NLRB tended to expand its interpretation of the Act to maximize coverage of the statute. The report noted that Congress intended that the Act should always have been construed to exclude "supervisors," but that "the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." H. Rep. No. 245, 80th Cong., 1st Sess. 17, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 308 (Comm. Print 1974) (emphasis in original).

Finally, the Senate Report explains its recommended amendment, today's § 2(11): "All that the proposal does is to prevent employers being compelled to accord supervisors the anomalous status of employees for the purpose of the Wagner Act." S. Rep. No. 105, 80th Cong., 1st Sess. 19, reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 425 (Comm. Print 1974), *cited in NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987).

The Sixth Circuit has long recognized that

> The purpose of this rule [that supervisory units are voluntary] was to ensure that no one, whether employee or employer need have as his agent [i.e., supervisor] one who is obligated to those on the other side, or one whom, for any reason, he does not trust.

Newspaper Drivers & Handlers v. NLRB, 735 F.2d 969, 971 (6th Cir. 1984), *quoting* H. Rep. 245, 80th Cong., 1st Sess. 17 (1947). *See also District 2, Marine Eng'rs Beneficial Ass'n v. Amoco*, 554 F.2d 774, 778 n.5 (6th Cir. 1977). The Sixth Circuit relies upon this legislative history to establish that Congress intended the Board to protect supervisory status as well as the rights of employees.

Congress explicitly recognized that as a matter of public policy, management must be free to rely on the undivided loyalty of its supervisors. In no industry is this policy more vital to the public interest than in the health care industry. Care providers, such as the members of the AHCA, are entrusted with the health and well-being of the nation's elderly and infirm. Health care employers entrust their supervisors with more than the success of their businesses; they entrust them with the lives of our citizens. The concerns voiced by Congress in 1947 regarding the negative impact of attenuated supervisor loyalty (reduced productivity, diminished quality, etc.) could have no more compelling significance than where the "product" provided to the public is health care.

It is abundantly clear from the circumstances of Section 2(11)'s passage that the interests protected by the National Labor Relations Act are more than exclusively those of employees. The Board's reluctance to recognize the will of Congress does not diminish the fact that "supervisory status" is *not* an exemption from the Act, but an additional protected classification under the Act. The Circuit Court's requirement that the Board bear the burden to prove that KRCC's nurses are not supervisors is that court's recognition of the Act's competing interests, and is the proper accommodation the Board should provide to protect those interests.

2. The Board's Policy Bias Against Finding Supervisory Status Justifies the Sixth Circuit's Allocation of The Burden Of Persuasion.

As stated *supra*, the House report on the Taft-Hartley amendments criticized the Board's eagerness to include supervisors within the coverage of the Act. In more recent times, the Board has shown the same tendency with regard to nurses under Section 2(11). Courts have recognized that the Board, rather than accept Congress' express will, has regularly, systematically, and as a matter of policy, sought to avoid findings of supervisory status. *See, e.g., Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997), ("[T]he Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area").

In *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999), the Fourth Circuit reasserted concerns, originally voiced 17 years earlier, that the Board's ever-changing analyses in Section 2(11) cases revealed a "policy bias" against finding nurses to be supervisors. *See also St. Mary's Home v. NLRB*, 690 F.2d 1062, 1067 (4th Cir. 1982) (NLRB perceived as having "institutional or policy bias" against finding supervisory status). In *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 340 n.8 (4th Cir. 1998), the court framed the policy pursued by the Board:

> We are not the first court to wonder whether this new interpretation is an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair

> labor practice findings it makes rather than explicate a well-reasoned interpretation of the NLRA. . . . This troubling pattern leads us to the conclusion that the Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the Third Branch.

Id., *citing Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997)

The Sixth Circuit has been an outspoken critic of the Board's failure to consistently apply Section 2(11), particularly in cases involving health care employers. *See NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987) (criticizing the Board's reluctance to apply statutory standard). That court has recognized the Board pursues its own agenda in deciding cases involving supervisory status. Consider this further admonishment to the Board by the court in *Caremore, Inc. v. NLRB*, *supra*.

> The NLRB's position generally has been that supervisory status is almost never to be accorded nurses whose supervisory authority is exercised over less-skilled professionals in the interest of patient care. The NLRB has adhered to this line despite our repeated admonitions to the contrary . . . . *Because the NLRB continues to misapprehend both the law and its own place in the legal system,* today we state for the fifth time that individuals who possess authority in any area listed in Section 2 (11) of the NLRA (*including* the authority to effectively recommend any of the

> specifically listed actions), who exercise that authority in the interest of the employer (*including* cases in which the employer's interests is furthered by the provision of patient care), and who use independent judgment in the exercise of that authority, are supervisors within the meaning of the NLRA.

129 F.3d at 371 (emphasis added) (citations omitted).

These courts question whether the Board applies the law, or interprets it to achieve a desired result. It is, however, beyond contravention that the Board does not view supervisory status as an interest intended by Congress to be protected. The Sixth Circuit mandates that the Board recognize this intent, and gives it life by requiring the Board to bear the burden of proof in this case.

D. NLRB Representation Procedures Are Inadequate to Establish a Factual Basis Sustaining a Finding of Violation.

The NLRB has divested itself of any burden to satisfy an essential element of a Section 8(a)(5) violation — certification of an appropriate unit. As support for avoidance of this statutory burden, the Board cites no more than its own procedures. The Board asserts that it has no need to prove KRCC's nurses are not supervisors because it relies upon the record of the representation proceeding below, at which KRCC had the burden of proving supervisory status. Referring to this shift of the burden of proof as a mere "practical consideration," the Board explains

> Because the Board is not a litigating party to those proceedings, it is inappropriate to place an

> evidentiary burden in those proceedings on the Board. . . . Although the General Counsel is a party to an unfair labor practice proceeding, that circumstance does not warrant — let alone compel — a rule requiring General Counsel to bear the burden of proving . . . that disputed individuals . . . are not supervisors.

Petitioner's Brief at 41-42. Stated plainly, the Board contends that it has no burden in a representation case hearing, because it was not a party: the union and the employer were the parties. Procedure in a representation case compelled the employer to establish that its nurses were not supervisors. The Board, having ruled that they are employees, then uses that ruling as a substitute for the burden of proof it must carry in an unfair labor practice proceeding, as directed by Sections 8(a)(5) and 10(c) of the Act.

This case is a test of the Board's certification of a unit of putative supervisors. Under NLRB procedure, the Board in a representation proceeding determined that the nurses at issue were "employees." A representation proceeding is styled by the Board as "nonadversary," 29 C.F.R. § 101.20; *Ohio Masonic Home*, 295 N.L.R.B. 390, 393 n.7 (1989), a legal fiction if ever there was one.

When an employer asserts a unit proposed by a union is inappropriate because some or all of its members are supervisors, the Board places the burden of proof of supervisory status on the employer. *Ohio Masonic Home*, 295 NLRB at 393. Representation case hearings are presided over by a hearing officer, who is not an administrative law judge, and is often not a lawyer. John D. Feerick, Henry P. Baer, and Jonathan P. Arfa, *NLRB Representation Elections*

§ 7.3, at 234 (1989). The hearing officer does not permit the parties to explore issues such as witness pro-union bias on cross-examination.

Despite the fact that the parties typically present diametrically opposite evidence in these proceedings, the Board expressly does not render any credibility determination such as one would find in a determination by an administrative law judge. This is not surprising, since the finder of fact is the Regional Director, not the hearing officer who hears the evidence. *Id.* Instead, the Regional Director relies heavily on the report prepared by the hearing officers, and may review the hearing transcript. Despite his "distance" from the proceedings, the Regional Director does make *de facto* credibility determinations insofar as he resolves testimonial conflicts by finding the facts to be as one side or the other posits.

The decision of the Regional Director may be appealed to the NLRB. The NLRB's review is hampered by the absence of credibility determinations by the "finder of fact," the Regional Director. Decisions of the NLRB in representation cases are not immediately reviewable. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964). In order to gain judicial review, the employer must first lose a representation election. Following the election and Labor Board certification, the employer must refuse to bargain with the union, for the express purpose of inviting the union to file an unfair labor practice charge alleging an unlawful refusal to bargain, a violation of Section 8(a)(5). *Id.* The employer does not contest the charge, in effect admitting that it refused to bargain, but claims that it is doing so to appeal the Board's decision that the employees in question are not "supervisors" within the meaning of the Act.

The Board asserts this Court should not require it to prove the appropriateness of the unit in an unfair labor practice trial, because this would inconveniently cause a "relitigation" of supervisory status. Petitioner's Brief at 41-42. However, given the lack of procedural safeguards in representation cases, there is a question as to whether supervisory status is ever truly "litigated" in the first place. Concerns in this regard are exacerbated to the extent the Board renders representation case decisions to further an unstated policy goal of denying supervisory status to nurses.

The NLRB acknowledges that its General Counsel is a party in § 8(a)(5) cases, but contends that it essentially has no burden of proof. According to Petitioner, the General Counsel's "burden" is just to show (1) the "existence" of NLRB-issued certification, whether valid or not; (2) the union demanded to bargain with the employer; and (3) the employer refused. Petitioner Brief, p. 41. The Board conducts no hearing on the charge. No ALJ hearing is conducted as to the threshold determination that the employees at issue are not supervisors. The record of the representation case below is relied upon as adequately establishing the requisite facts. The Board summarily finds the employer violated the Act. At that point, the employer can seek judicial review. Thus, Board procedures are both a sword to bind employers to findings that its putative supervisors are employees, and a shield to avoid the burden of having to actually prove it.

As this analysis of Board procedure displays, neither the General Counsel nor anyone else associated with the NLRB has any substantive burden of proof to sustain the Board's order that the employer violated the Act. Instead, the NLRB attempts to circumvents Section 10(c) of the

NLRA and Section 7(c) of the APA with the glib assertion that unit issues are fully litigated during the representation stage. Under the Board's procedure, the only party with any substantive burden is the employer, the respondent charged with violating the NLRA. As the Sixth Circuit found, the Board's reliance on its procedures to abandon its obligation to prove *all* the elements of the unfair labor practice it found justifies the denial of enforcement to its order.

CONCLUSION

The AHCA urges this Court to affirm the decision of the Sixth Circuit finding the nurses are not supervisors within the meaning of Section 2(11) of the NLRA. Additionally, the AHCA urges this Court to affirm the Sixth Circuit's requirement that the NLRB prove that the nurses are non-supervisory employees as an element of the unfair labor practice found in its order. The judgment of the Sixth Circuit regarding the burden of proof should be affirmed for three principal reasons: (1) the Board has ignored its statutory obligation to prove each element of an alleged violation; (2) the Board ignores the express will of Congress to protect the employer's supervisory rights; and (3) representation case procedure is an inadequate substitute for the Board's statutory burden of proof.

Respectfully submitted,

THOMAS V. WALSH
Counsel of Record
THOMAS P. MCDONOUGH
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
Attorneys for Amicus Curiae
American Health Care Association
One North Broadway
Suite 1502
White Plains, New York 10601
(914) 328-0404